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**Supreme Court of the United States**

**OCTOBER TERM, 1953**

**No. 45**

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**BEACON THEATRES, INC., PETITIONER,**

**vs.**

**THE HON. HARRY C. WESTOVER, Judge of the United  
States District Court of the Southern District of Cali-  
fornia, Central Division, et al.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED APRIL 8, 1953  
CERTIORARI GRANTED MAY 19, 1953**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 45

BEACON THEATRES, INC., PETITIONER,

vs.

THE HON. HARRY C. WESTOVER, Judge of the United States District Court of the Southern District of California, Central Division, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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fol. 1]

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

BEACON THEATRES, INC., a corporation, Petitioner,

vs.

THE HON. HARRY C. WESTOVER, Judge of the United States  
District Court of the Southern District of California,  
Central Division, Respondent.

APPLICATION FOR LEAVE TO FILE WRIT OF MANDAMUS—

Dated May 27, 1957

*To the Honorable, the Judges of the United States Court of  
Appeals for the Ninth Circuit:*

Application is hereby respectfully made for leave to file  
the annexed Petition for Writ of Mandamus.

Dated: May 27, 1957.

Weller and Corinblit, By Fred Weller, By Jack  
Corinblit, Attorneys for Petitioner.

fol. 3]

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

[Title omitted]

PETITION FOR WRIT OF MANDAMUS

*To the Honorable, the Judges of the United States Court of  
Appeals, Ninth Circuit:*

Comes now the Petitioner and respectfully applies for a  
writ of mandamus, and in this respect states the following  
facts and causes for the issuance of said writ of mandamus.

## I.

Jurisdiction of this court of the instant petition for writ of mandamus arises under 28 U. S. C. A., par. 1651.

## II.

Respondent is the Honorable Harry C. Westover, Judge of the United States District Court of the Southern District of California, Central Division. The real parties in interest are Fox West Coast Theatres Corporation, hereinafter referred to as "Fox West Coast," a Delaware corporation, and Pacific Drive-in Theatres, Inc., a California corporation.

## III.

On the 31st day of October, 1956, a civil complaint was filed in the United States District Court of the Southern District of California, Central Division, entitled "Fox West Coast Theatres Corporation, a California corporation, plaintiffs, vs. Beacon Theatres, Inc., a corporation, defendant, No. 20688 HW." Said complaint was entitled, "Complaint for Declaratory Relief." (A copy of said complaint for declaratory relief is attached hereto and marked Exhibit A.)

## IV.

The complaint of Fox West Coast Theatres Corporation made the following allegations: That the action was brought pursuant to the Federal Declaratory Judgment Act, 28 U. S. C. A., Sections 2201-2202, and that the matter in controversy exceeded \$3,000.00 and arose under Sections 1 and 2 of the Act of Congress of 1890, commonly known as the "Sherman Act," and Section 4 of the Act of October 15, 1914, commonly known as the "Clayton Act."

It was alleged that the plaintiff, Fox West Coast Theatres Corporation, was engaged in the business of operating motion picture theatres, and particularly that it operated a motion picture theatre known as the California Theatre, located in the City of San Bernardino, California. It was alleged that prior to the filing of said complaint the major producers and distributors of motion pictures in the United

States had licensed said California Theatre to exhibit these [fol. 5] motion pictures on "first run in the San Bernardino competitive area" and had further licensed to said California Theatre, when it obtained these first run exhibition pictures, a reasonable period of "clearance" or "protection" before the same motion picture was "licensed for a subsequent run's exhibition in said area. The term "runs" was defined in the complaint as, "The successive exhibitions of a motion picture in a given area, first run being the first exhibition in that area, second run being the next subsequent, and so on." The term "clearance" was defined as, "The period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres."

The complaint further alleged that Fox West Coast had a valuable property right in the right of its California Theatre to negotiate with the major producers and distributors of motion pictures for "first-run" and in the right to negotiate for "a reasonable period of clearance" in said area. It was alleged that the deprivation of these property rights would result in substantial monetary loss to said theatre.

The complaint then alleged that Petitioner had recently constructed a theatre known as the "Belair Drive-In Theatre," catering exclusively to patrons in automobiles, and located approximately eleven miles from said Fox West Coast California Theatre.

It was alleged in effect that Petitioner, on behalf of its Belair Drive-In Theatre, had sought to obtain from the major producers and motion picture distributors the privilege of exhibiting motion pictures *simultaneously with* the exhibition of said motion pictures in the Fox West Coast California Theatre instead of exhibiting said pictures *after* the Fox West Coast California Theatre. It was alleged in effect that Petitioner had obtained from some distributors this privilege of exhibiting motion pictures simultaneously with the exhibition of said motion pictures in the Fox West Coast California Theatre.

The complaint then alleged that there was an actual controversy between the parties as follows:



(a) The Petitioner contended that the Fox West Coast California Theatre and Petitioner's Belair Drive-In Theatre were not in substantial competition with each other. That Fox West Coast contended that said theatres were in substantial competition with each other.

(b) That Petitioner contended that its Belair Drive-In Theatre was entitled to exhibit motion pictures simultaneously with the Fox West Coast California Theatre, but that Fox West Coast contended that the parties were entitled to negotiate for an exclusive prior run for their respective theatres, one over the other.

(c) That Fox West Coast contended that the facts of substantial competition justified the granting of clearance within the meaning of certain decisions and decrees entered in the case of United States District Court for the Southern District of New York, being Equity No. 87273.

(d) That Fox West Coast contended that there was no *obligation* on the part of any distributor to grant to Petitioner's Belair Theatre a simultaneous exhibition of motion pictures with the Fox West Coast California Theatre.

(e) It was further alleged that Petitioner had threatened Fox West Coast and had stated to Fox West Coast that it had threatened the major distributors that if Fox West Coast was permitted to continue to obtain clearance [fol. 7] over Petitioner's Belair Drive-In Theatre, that Petitioner would bring an action for damages under the anti-trust laws for conspiracy in restraint of trade between Fox West Coast and the distributors.

## V.

That, in essence, the complaint of Fox West Coast alleged:

(a) That prior to the opening of Petitioner's Belair Drive-In Theatre, Fox West Coast had always received an exclusive prior run and clearance or protection over theatres in the San Bernardino area.

(b) That when Petitioner opened its new drive-in theatre, it had attempted to obtain the privilege of simultane-

us exhibition with the Fox West Coast California Theatre, and that some distributors had granted to Petitioner that privilege.

(c) That Petitioner contended that its theatre was not in substantial competition with the California Theatre and that Fox West Coast contended to the contrary.

(d) That Petitioner had threatened Fox West Coast and the distributors that, if it was compelled to continue to exhibit pictures behind the Fox West Coast California Theatre, and was subjected to clearance, that it would file an action for damages under the antitrust laws.

In its complaint, Fox West Coast prayed that it be decreed that:

(1) Clearance between the two theatres was reasonable and not a violation of the antitrust laws; or of the decrees in *United States v. Paramount, et al.*

(2) That the distributors of motion pictures were entitled to negotiate with the parties and with others for a prior run in said area.

[fol. 8] (3) *Pendente lite*, Fox West Coast sought an injunction to restrain Petitioner from filing any action under the antitrust laws until its suit for declaratory relief could be adjudicated.

## VI.

On the 17th day of January, 1957, Respondent entered an order denying Petitioner's motion to dismiss the complaint, which had been based upon the grounds that said complaint was in excess of the jurisdiction of the Federal Courts because said complaint did not show a case or controversy, as required by Article III, Section 2, of the Constitution of the United States. On the same day, Respondent entered an order, over the objection of Petitioner, granting leave to Pacific Drive-In Theatres Corp., a California Corporation, to intervene in the action below as a defendant. [A copy of Petitioner's motion to dismiss for lack of jurisdiction is attached hereto and marked Exhibit B.] [A copy of Respondent's order denying said motion is attached here-

to and marked Exhibit C.] [The answer of Pacific Drive-In Theatres, Inc. as an intervening defendant is attached hereto marked Exhibit D.]

## VII.

On the 18th day of February, 1957, Petitioner filed its answer. Petitioner alleged by way of denial, affirmative defense and a counter-claim seeking damages and injunctive relief under the antitrust laws,

(a) That Fox West Coast and Pacific Drive-In Theatres Corporation and certain other designated corporations were engaged in a combination conspiracy to restrain and monopolize the exhibition of motion pictures in the San Bernardino area.

[fol. 9] (b) That said parties had agreed, pursuant to that conspiracy, to prevent Petitioner's Belair Theatre from obtaining the privilege of exhibiting motion pictures on a first run availability, simultaneously with the exhibition of said motion pictures in the theatres of Fox West Coast, Pacific Drive-In and others.

(c) That Petitioner's Belair Drive-In Theatre was not in substantial competition with any of the theatres of Fox West Coast.

(d) That the continued granting of clearance to Fox West Coast over Petitioner's Drive-In Theatre, and the prevention of Petitioner's Belair Theatre from exhibiting motion pictures simultaneously with the theatres of Fox West Coast and others, was a practice carried on pursuant to and part of a conspiracy to restrain the business of Petitioner in operating the Belair Drive-In Theatre. [A copy of Petitioner's Answer and Counterclaim is attached hereto and marked Exhibit E-1.]

## VIII.

That on the 18th day of February, 1957, Petitioner, pursuant to Rule 38 of the Federal Rules of Civil Procedure, and the Seventh Amendment to the Constitution of the United States, filed and served upon all parties a timely

demand for a jury trial as to all issues of the complaint, answer and counterclaim.

### IX.

On the 21st day of March, 1957, Respondent, on motion of Fox West Coast, and over the objections of Petitioner, entered an order:

(a) Striking Petitioner's Demand for Jury Trial as to the complaint and answer;

[fol. 10] (b) Striking the portions of Petitioner's answer and affirmative defense relating to antitrust violations by Fox West Coast;

(c) Directing that trial be held by the court alone on all of the issues in the complaint, including the issues which were common to Petitioner's antitrust defenses and counterclaim, and that only after such trial, that Petitioner be permitted to try the issues set forth in its counterclaim to a jury.

The grounds stated by Respondent for the entry of said order were that an action for declaratory relief was an action in equity. [A copy of the memorandum of Fox West Coast in support of its motion to strike Petitioner's demand for jury trial is attached hereto and marked Exhibit E2.] A transcript of the proceedings wherein Respondent's order was made is attached hereto and marked Exhibit F. A copy of the order entered by Respondent is attached hereto and marked Exhibit G. A copy of the answer of Fox West Coast Theatres Corporation to the Petitioner's counterclaim and cross-claim is attached hereto and marked Exhibit H. A copy of the answer of Pacific Drive-In Theatres Corporation to Petitioner's cross-claim is attached hereto and marked Exhibit I.

### X.

The ruling that an action for declaratory relief is an action in equity and the order of Respondent, based thereon, striking Petitioner's demand for jury trial as to the complaint and answer, striking the antitrust defenses of Petitioner's answer, and ordering the trial without a jury



of said complaint, unlawfully deprived Petitioner of its right to jury trial under the Seventh Amendment to the Constitution of the United States, and Rule 57 of the [fol. 11] Federal Rules of Civil Procedure of the following matters, at least, raised by the complaint:

(a) The existence of substantial competition between Petitioner's Belair Drive-In Theatre and Fox West Coast California Theatre.

(b) The existence of unreasonable clearance between said theatres.

(c) The relative desirability of said theatres to distributors of motion pictures as outlets for first run feature motion pictures.

(d) Whether in fact requests were made by theatres for first run availability and clearance from the various motion picture distributors.

## XI.

In addition to the foregoing, Respondent, in making an order striking Petitioner's demand for jury trial as to the complaint and answer, and at the same time entering an order directing the prior trial and determination by the court alone of the issues in the complaint, which were also common issues in the counterclaim and the answer, wrongfully deprived Petitioner of its right to trial by jury of the counterclaim under the Seventh Amendment of the Constitution and Rule 57 of the Federal Rules of Civil Procedure as to the issues set forth in Paragraph X above.

Under principles of estoppel, *res adjudicata* and the law of the case, as established by rulings of this court, such a prior determination by the trial court without a jury will bar a subsequent jury determination of these common issues. Therefore, in entering an order striking Petitioner's demand for a jury trial and setting the court trial of these common issues before the trial of those same [fol. 12] issues under the counterclaim, Respondent unlawfully deprived Petitioner of its right to a jury trial of its counterclaim.

## XII.

Respondent's order of January 17, 1957, overruling petitioner's motion to dismiss, wrongfully asserted jurisdiction of said complaint, in that said complaint, patently on its face, does not set forth a case or controversy under Article III, Section 2 of the Constitution of the United States, in that:

- (a) It seeks an advisory opinion only as to the existence of substantial competition between two theatres;
- (b) It does not allege any actual or threatened interference with any legal right;
- (c) It seeks no relief against Petitioner;
- (d) It seeks no relief which could under any circumstances finally settle and determine the alleged controversy because it does not name as parties the distributors of motion pictures who, alone, grant or refrain from granting clearance, and against whom, alone, therefore, final relief could be granted.

Respondent's action in asserting jurisdiction, therefore, is in excess of the jurisdiction of the United States District Court.

## XIII.

Petitioner has no speedy or adequate remedy in the ordinary course of law.

ol. 13] Wherefore, Petitioner respectfully prays:

(1) That an alternative writ of mandate be issued out and under the seal of this Court, directed to and commanding the Respondent:

(a) To enter an order dismissing the complaint as being in excess of the jurisdiction of the United States District Court;

(b) In the alternative, to vacate his order striking Petitioner's demand for jury trial as to the complaint and answer, to vacate his order striking portions of Petitioner's answer; and to vacate his order setting for trial the issues of the complaint prior to the trial of the counterclaim;

(d) Directing Respondent to proceed with the trial of all issues of the complaint, answer, and counterclaim triable to a jury prior to or simultaneous with the trial by the court of any issues properly triable by the court alone.

(2) That upon the return of the alternative writ, and the hearing upon the order to show cause, a peremptory writ of mandate be issued to Respondent commanding and directing him as herein prayed.

(3) That the court grant such further relief that may be appropriate in the premises.

Weller & Corinblit, By Fred Weller, By Jack Corinblit, Attorneys for Petitioner.

[fol. 14] *Duly sworn to by Fred Weller, jurat omitted in printing.*

[fol. 15]

#### EXHIBIT A TO PETITION

##### Law Offices

Newlin, Tackabury & Johnston  
1100 Roosevelt Building  
Los Angeles 17  
MUtual 7205  
Attorneys for Plaintiff.

United States District Court, Southern District of California, Central Division.

Fox West Coast Theatres Corporation, a corporation Plaintiff, vs. Beacon Theatres, Inc., a corporation, Defendant. Civil Action No. 20658-HW.

Received No. 2, 1956.

#### COMPLAINT FOR DECLARATORY RELIEF.

Comes now the plaintiff and complains of the above named defendant, and alleges as follows:

## I.

This action is brought pursuant to the Federal Declaratory Judgment Act, Title 28, U. S. C., Sections 2201 and 2202, to have the Court declare the rights and obligations of the parties under the facts hereinafter set forth.

## II.

The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00), and arises under the law of the United States, to-wit, Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, and Section 4 of the Act of October 15, 1914, amendatory thereof, commonly known as the Clayton Act.

[fol. 16]

## III.

Plaintiff Fox West Coast Theatres Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware and is engaged in business in the State of California and in the Southern District of California.

## IV.

Defendant Beacon Theatres, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, and is engaged in business in the State of California and in the Southern District of California. Plaintiff is informed and believes and upon such ground alleges that said defendant operates as owner or lessee the Bel-Air Drive-In Theatre in the County of San Bernardino.

## V.

(a) Paramount Pictures, Inc. is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the City of New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or



through subsidiary or associated companies, in various parts of the United States, including the State of California and the Southern District of California.

(b) RKO Radio Pictures, Inc. is a corporation organized under the laws of the State of Delaware, with its principal place of business in the City of New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated corporations, in various parts of the United States, including the State of California and the Southern District of California.

[fol. 17] (c) Warner Brothers Pictures, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the City of New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States, including the State of California and the Southern District of California.

(d) Twentieth Century-Fox Film Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the City of New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various part of the United States, including the State of California and the Southern District of California.

(e) Columbia Pictures Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the City of New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States, including the State of California and the Southern District of California.

(f) Universal Film Exchanges, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the City of

New York, New York, and is engaged in the business of distributing motion pictures in various parts of the United States, including the State of California and the Southern District of California.

[fol. 18] (g) Loews, Incorporated is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the City of New York, New York, and is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies, in various parts of the United States, including the State of California and the Southern District of California.

(h) United Artists Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the City of New York, New York, and is engaged in the distribution of motion pictures in various parts of the United States, including the State of California and the Southern District of California.

(i) The foregoing corporations and their respective subsidiary or associated corporations are hereinafter sometimes referred to as "the Distributors."

## VI.

The Distributors constitute in the aggregate the major distributors of motion pictures in the United States, and plaintiff is informed and believes and upon such ground alleges that between them the Distributors license for exhibition in theatres in the United States the great majority in number and quality of feature motion pictures produced in the United States and available for exhibition.

## VII.

On June 11, 1946, a Special Expediting Court, convened under the authority of the Expediting Act of February 11, 1903 (15 USC Section 29), sitting as the United States District Court for the Southern District of New York in the matter of *United States of America, Plaintiff v. Paramount Pictures, Inc., et al., Defendants*, Equity No. [fol. 19]

87-273, to which action the Distributors above named were parties defendant, filed an opinion in which the court, among other things, defined "runs" and "clearances" in the distribution and exhibition of motion pictures as follows:

"Runs—The successive exhibition of a motion picture in a given area, first run being the first exhibition in that area, second run being the next subsequent and so on.

"Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres."

Said opinion further found that "a grant of clearance, when not accompanied by a fixing of minimum prices or not unduly extended as to area or duration, affords a fair protection to the interests of the public." Said opinion further provided that the decision whether in any particular case unreasonable clearances have been or are being imposed and whether clearances as between theatres which are not in substantial competition to each other have been or are being imposed should be "left to local suits in the area concerned." On February 8, 1950, said court filed its Findings of Fact, including among other findings the following:

"76. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later exhibiting theatre at lower than prior rates.

"77. A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly [fol. 20] extended as to area or duration affords a fair protection of the interest of the licensee in the run granted without unreasonably interfering with the interest of the public.

"78. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures. The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business."

On the same day, to-wit, February 8, 1950, said court made and entered final decrees against distributors Loews, Incorporated, Warner Brothers Pictures, Inc., Twentieth Century-Fox Film Corporation, Columbia Pictures Corporation, Universal Film Exchanges, Inc., and United Artists Corporation, in which decrees, among other things, said distributors were enjoined

"3. From granting any clearance between theatres not in substantial competition;

"4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted."

The distributors RKO Radio Pictures, Inc. and Paramount Pictures, Inc. had previously and on November 8, 1948, and March 3, 1949, respectively, entered into consent decrees, which decrees contained identical injunctive provisions.

The said Expediting Court in said consent and final decrees retained jurisdiction "for the purpose of enabling any of the parties to this decree, and no others, to apply to [fol. 21] the Court at any time for such orders or direction as may be necessary or proper for the construction, modification, or carrying out of the same, for the enforcement or compliance therewith, and for punishment of violations thereof, or for other or further relief."

### VIII.

Plaintiff is the owner and operator of a modern deluxe first-class theatre, called the "California Theatre," located at 562 Fourth Street, in the City of San Bernardino, California. The Distributors hereinabove mentioned have heretofore licensed or offered to license to plaintiffs' said theatre feature motion pictures distributed by them upon first-run in the San Bernardino competitive area, and have heretofore granted, after negotiation therefor, to plaintiff and plaintiff's said California Theatre, when it has been licensed motion picture for first-run exhibition in the



San Bernardino competitive area, a reasonable period of clearance or protection before the same motion picture is licensed for subsequent run exhibition in said area. That the right so negotiate with the Distributors for first-run exhibition of motion pictures in said San Bernardino competitive area and to negotiate for a reasonable period of clearance or priority of run over subsequent exhibitions of the same motion picture in said area are and each of them is a valuable property right of plaintiff and of plaintiff's said California Theatre, the deprivation of which would result in substantial monetary damage and loss to plaintiff.

#### IX.

Defendant has recently constructed a drive-in theatre having a capacity for approximately one thousand automobiles, which said drive-in theatre is within the San [fol. 22] Bernardino competitive area and is located approximately eleven miles from plaintiff's California Theatre in the City of San Bernardino, on the San Bernardino-Los Angeles Freeway, U.S. No. 99. Said defendant's drive-in theatre caters exclusively to patrons in motor vehicles, and plaintiff is informed and believes and upon such ground alleges that the average driving time within posted legal speed limits between defendant's said drive-in theatre and plaintiff's California Theatre is not more than twenty minutes.

#### X.

In addition to the aforementioned two theatres, there are a number of other theatres, both of the conventional and drive-in type, located within the city limits of San Bernardino and in the San Bernardino competitive area, within a distance of twelve miles from the defendant's Bel-Air Drive-In and within a distance of twelve miles from plaintiff's California Theatre.

#### XI.

An actual controversy relating to the legal rights and liabilities of plaintiff and defendant exists and arises out of the following facts:

Defendant contends that its theatre is not in substantial competition with plaintiff's California Theatre, or with other theatres located in the San Bernardino competitive area, and that it is entitled to exhibit motion pictures distributed by the above named Distributors day and date, that is to say simultaneously, with their first-run exhibition in the San Bernardino competitive area, and that neither the plaintiff nor the other owners and operators of theatres within said area are entitled to negotiate with said Distributors for any clearance over defendant's Bel-Air Drive-In Theatre.

[fol. 23] Plaintiff contends that its California Theatre is substantially competitive with defendant's Bel-Air Drive-In Theatre on first-run in said area, and that the other said theatres in the San Bernardino area are each of them substantially competitive with each other, to an extent justifying the granting of clearance to one theatre over others within the purview of the opinion and findings of the Special Expediting Court in *United States v. Paramount Pictures, Inc., et al.*, above referred to, and that the granting of clearance by the Distributors would not be within the injunctive provisions against the granting of any clearance to theatres not in substantial competition within the meaning of the consent decrees and final decrees in said action above referred to.

Plaintiff further contends that it has an equal right with the defendant to negotiate with each Distributor independently for a prior run for plaintiff's California Theatre ahead of any other theatre, including defendant's Bel-Air Drive-In Theatre, in said competitive area and that there is no obligation on the part of any Distributor in such a case to grant an equal and simultaneous run to defendant's said Bel-Air Drive-In Theatre.

## XII.

The defendant, in addition to contending that its said Bel-Air Drive-In Theatre is not substantially competitive with any other theatre in the San Bernardino area on first-run exhibition in said area, has threatened plaintiff and has stated to plaintiff in substance and effect that it has threatened the Distributors above mentioned that if plain-

tiff's said California Theatre is granted any clearance over defendant's Bel-Air Drive-In Theatre, or is granted a prior run, said action on the part of plaintiff will be deemed by defendant to be an overt act in concert with any distributor [fol. 24] who may grant plaintiff such clearance or such priority of run in restraint of trade and a violation of the Sherman Antitrust Act and of the decrees of the Special Expediting Court in *United States v. Paramount Pictures, Inc., et al.*, and that plaintiff will be subjected to an action by said defendant for treble damages under Section 4 of the Clayton Act (Title 15 USC Section 15). That said threats and the duress and coercion upon the Distributors arising out of and resulting from said threats of litigation threaten to and have in fact deprived plaintiff and its said California Theatre of the right to negotiate for motion pictures upon their first-run in the San Bernardino area and to negotiate for clearance over theatres in competition with plaintiff's said theatre upon said first-run, including defendant's Bel-Air Drive-In Theatre. That plaintiff is without any speedy or adequate remedy at law and will be irreparably harmed unless defendant and its officers, agents and employees, are restrained and enjoined from instituting any action under the anti-trust laws against plaintiff and said Distributors, or any of them, based upon the facts hereinabove alleged during the pendency of this action and until such time as the court shall determine whether or not the plaintiff and defendant have an equal and correlative right to license a prior run with clearance on behalf of their respective theatres.

WHEREFORE, plaintiff prays judgment as follows:

1. That it be decreed that a grant of clearance between theatres on first-run in the San Bernardino competitive area, and particularly between plaintiff's California Theatre and defendant's Bel-Air Drive-In Theatre, is reasonable and is not a violation of the anti-trust laws or of the decrees in *United States v. Paramount Pictures, Inc., et al.*

[fol. 25] 2. That it be decreed that the Distributors are and each of them is entitled to negotiate with plaintiff and

defendant and with other owners and operators of theatres in said competitive area equally for a prior run in said competitive area.

3. That the Court declare such other rights or duties as may be necessary or proper in respect of the controversy heretofore alleged.

4. That pending final decision of the Court herein, defendant Beacon Theatres, Inc., and its officers, agents and employees, be restrained and enjoined from commencing any action under the anti-trust laws of the United States against plaintiff and against the Distributors hereinabove named, or any of them, arising out of the facts or controversies between the parties herein alleged.

5. That the Court give such further relief, equitable or otherwise, as the Court deems proper or necessary in the premises.

6. For plaintiff's costs of suit herein incurred.

NEWLIN, TACKABURY & JOHNSTON

By FRANK F. JOHNSTON

By HUDSON B. COX

Attorneys for Plaintiff.

{fol. 26]

## EXHIBIT B TO PETITION

Weller & Corinblit  
3325 Wilshire Blvd. No. 1010  
Los Angeles 5, California  
DUmkirk 5-2118  
Attorneys for Defendant.

United States District Court, Southern District of California, Central Division.

Fox West Coast Theatres Corporation, a corporation, Plaintiff, vs. Beacon Theatres, Inc., a corporation, Defendant. Civil Action No. 20658-HW.

## NOTICE OF MOTION AND MOTION.

To plaintiff, Fox West Coast Theatres Corporation, and its counsel of record:

PLEASE TAKE NOTICE that defendant, Beacon Theatres, Inc., on January 14, 1957, in the court of the Honorable Harry C. Westover, United States Post Office and Court House, Temple & Spring Streets, Los Angeles, California, at 10:00 A.M., or as soon thereafter as this matter may be heard, will move that the above entitled complaint for declaratory relief be dismissed upon the following grounds:

- a) That this court lacks jurisdiction over the subject matter of the complaint herein, and
- b) That the complaint herein fails to state a claim upon which relief can be granted.

This motion is based upon the complaint and the entire file in this case, together with defendant's points and authorities which are attached hereto.

Respectfully submitted,

WELLER & CORINBLIT

By /s/ Fred Weller  
/s/ Jack Corinblit.



[fol. 27]

## EXHIBIT C TO PETITION

Law Offices  
 Newlin, Tackabury & Johnston  
 1100 Roosevelt Building  
 Los Angeles 17  
 MUtual 7205  
 Attorneys for Plaintiff.

United States District Court, Southern District of California, Central Division.

Fox West Coast Theatres Corporation, a corporation, Plaintiff, vs. Beacon Theatres, Inc., a corporation, Defendant. Civil Action No. 20658-HW.

## ORDER.

The motion to dismiss plaintiff's complaint of defendant Beacon Theatres, Inc. having come on regularly to be heard in the above entitled Court on Monday, January 14, 1957, before the Honorable Harry C. Westover, Judge Presiding, plaintiff appearing by Messrs. Newlin, Tackabury & Johnston, by Frank R. Johnston and Hudson B. Cox, Esquires, and defendant appearing by Fred A. Weller and Jock Corinblit, Esquires, and the issues raised by said motion having been fully briefed and argued and the Court being fully advised in the premises.

NOW, THEREFORE, IT IS ORDERED

That said motion to dismiss plaintiff's complaint be and the same is hereby denied. Defendant to have twenty days [fol. 28] after the date hereof within which to serve and file its answer to plaintiff's complaint.

Dated, January ....., 1957.

\_\_\_\_\_  
 Judge of the United States District Court.

Approved As To Form

Disapproved As To Form

WELLER & CORINBLIT

By \_\_\_\_\_  
 Attorneys for defendant.

[fol. 29]

## EXHIBIT D TO PETITION

Law Offices  
 Swerdlow, Glikbarg & Nicholas  
 232 North Camden Drive  
 Beverly Hills, California  
 CRestview 1-1147.  
 BRadshaw 2-0141  
 Attorneys for Intervening Defendant.

United States District Court, Southern District of California, Central Division.

Fox West Coast Theatres Corporation, a corporation  
 Plaintiff, vs. Beacon Theatres, Inc., a corporation, Defendant,  
 Pacific Drive-In Theatres Corp., a corporation  
 Applicant for Intervention. Civil Action No. 20658-W.

## INTERVENER'S ANSWER.

Intervening defendant Pacific Drive-In Theatres Corporation, a California corporation, answers the complaint as follows:

## I.

With respect to paragraphs I and II of the complaint, this intervening defendant admits that plaintiff seeks to invoke the jurisdiction of this court under the statute specified in said paragraph and that the matter in controversy exclusive of interest and costs exceeds the sum or value of Three Thousand Dollars (\$3,000.00).

## II.

Intervening defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs III, IV and V of the complaint.

[fol. 30]

## III.

Intervening defendant admits that the motion picture distributors referred to in said complaint constitute the

major distributors of motion pictures in the United States and license for exhibition the great majority in number and quality of feature motion pictures produced in the United States and available for exhibition.

#### IV.

Intervening defendant denies each and every allegation contained in paragraph VII of the complaint except that it admits that in July of 1938 the United States of America instituted an action in the District Court of the United States for the Southern District of New York entitled *United States v. Paramount Pictures, Inc., et al.*, bearing equity number 87-273 and that the proceedings taken therein are as disclosed in the records and files of said action and the appeals taken therefrom.

#### V.

Intervening defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII except that it admits that the right to negotiate for first run exhibition of motion pictures in the San Bernardino competitive area and to negotiate for a reasonable period of clearance for priority of run over subsequent exhibitions of the same motion picture in the said area are each valuable property rights of any motion picture exhibitor.

#### VI.

Intervening defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IX except that it admits that a new drive-in theatre has recently been constructed [fol. 31] approximately eleven (11) miles from plaintiff's theatre in the City of San Bernardino.

#### VII.

Intervening defendant admits the allegations contained in paragraph X of the complaint.

## VIII.

Intervening defendant denies each of the allegations contained in paragraph XI of the complaint except that it admits that all of the theatres in the San Bernardino competitive area including San Bernardino, Redlands, Colton, Fontana, Highland and Yucaipa are in direct and substantial competition with each other and that among these theatres are included the plaintiff's California theatre, the defendant's Beacon Theatres, Inc., Bel Air drive-in theatre and intervening defendant's, Pacific Drive-In Theatre Corp., Tri-City and Baseline drive-in theatres; that such theatres are in substantial competition to each other to the extent justifying the granting of clearance to one theatre over the others under the law and further that the drive-in theatres in said San Bernardino competitive area are far more in direct and substantial competition with each other than with so-called conventional theatres in the same area; and that it is prepared to exhibit pictures in a drive-in theatre on a day and date availability with a conventional theatre in the City of San Bernardino.

## IX.

Intervening defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph XII except that it alleges that defendant Beacon Theatres, Inc. has threatened it with litigation in the event that intervening defendant's Tri-City and Base [fol. 32] line drive-in theatres are granted by distributors clearance over or a prior run to defendant's Beacon Theatres, Inc., Bel Air Drive-In theatre and that said threats of litigation have also been made directly to distributors of motion pictures and are depriving defendant Pacific Drive-In Theatres Corp. of its right to bid competitively or negotiate for pictures in the greater San Bernardino area on a fair and equitable basis in competition with any and all other theatres in said competitive area.

## X.

Intervening defendant further admits that it is without any speedy or adequate remedy at law and will be irrepara-



bly harmed unless defendant Beacon Theatres, Inc. is enjoined and restrained from threatening to institute or instituting legal proceedings against itself and any distributors based upon the facts in said complaint during the pendency of this action and until such time as the court shall determine the rights of the parties hereto.

Wherefore, intervening defendant Pacific Drive-In Theatres Corp. prays judgment as follows:

1. That pending final decision of the court herein, defendant Beacon Theatres, Inc. and its officers, agents and employees be restrained and enjoined from commencing any action under the Anti-trust laws of the United States against plaintiff and against any motion picture distributors referred to in the complaint arising out of the facts or controversies alleged in the complaint.
2. That the court decree that a grant of clearance between theatres on first run exhibition in the San Bernardino competitive area is reasonable and not in violation of law.
3. That in the alternative the court decree that a grant of clearance between all drive-in theatres on first run exhibition in the San Bernardino competitive area and particularly between defendant's Beacon Theatres, Inc., Bel Air Drive-In theatre and intervening defendant's, Pacific Drive-In Theatres Corp., Tri-City and Baseline drive-in theatres is reasonable and not a violation of law, and that one of said drive-in theatres may play day and date first run San Bernardino with conventional theatres in the City of San Bernardino without any violation of law.
4. That the court give such other relief as to it may seem proper and just.
5. For costs of suit incurred herein.

SWERDLOW, GLIKBARG & NICHOLAS

By Harry B. Swerdlow

Attorneys for Pacific Drive-In Theatres Corp., intervening defendant.

[fol. 34]

## EXHIBIT E-1 TO PETITION

Weller & Corinblit,  
3325 Wilshire Blvd., #1010,  
Los Angeles 5, California,  
DUNKIRK 5-2118,  
Attorneys for Defendant.

United States District Court, Southern District of California, Central Division.

Fox West Coast Theatres Corporation, a corporation,  
Plaintiff, vs. Beacon Theatres, Inc., a corporation, Defendant. Civil Action 20658-WM.

ANSWER, COUNTER-CLAIM AND CROSS-CLAIM AND  
DEMAND FOR JURY TRIAL.

Comes now the defendant, Beacon Theatres, Inc., and in answer to the complaint on file alleges, admits and denies as follows:

## I.

Defendant denies each and every allegation contained in Paragraph I of plaintiff's complaint.

## II.

Answering Paragraph II of plaintiff's complaint, defendant denies each and every allegation contained therein and specifically denies that the matter in controversy exceeds \$3,000.00 or that the matter arises under Section 1 or 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Commerce", commonly known as the Sherman Act, or that said action arises under Section 4 of the Act of October 15, 1914, commonly known as the Clayton Act.

[fol. 35]

## III.

Answering Paragraph VII of plaintiff's complaint, defendant denies each and every allegation contained in said Paragraph VII and particularly denies that the allegations

thereof purporting to set forth portions of (a) the opinion of the District Court in *United States vs. Paramount*, Equity No. 87-273, dated June 11, 1946; (b) the findings of fact by said Court in said action dated February 8, 1950; (c) the final decrees entered on February 8, 1950 against Loew's, Inc., Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corp., Columbia Pictures Corp., Universal Film Exchanges, Inc., and United Artists Corp.; (d) the final decrees entered against RKO Radio Pictures, Inc., on November 8, 1948 and Paramount Pictures, Inc., on March 3, 1949, are full, fair, accurate or complete quotations or summaries of said documents. In this connection, defendant alleges that the opinion of the Expediting Court in *U. S. vs. Paramount, et al.* is set forth at 66 Fed Sup 323; that the opinion of the Supreme Court of the United States in said action is set forth in 334 US 131; that the opinion of the Expediting Court upon remand in said action is set forth at 85 Fed Sup 881; that defendant hereby incorporates said opinions in this answer as if fully set forth.

#### IV.

Answering Paragraph VIII of plaintiff's complaint, defendant is without knowledge or information to form a belief as to the allegation that plaintiff is the owner and operator of the California Theatre and upon that ground denies that plaintiff is the owner or operator of said theatre. Defendant further denies that said California Theatre is a modern, deluxe or first-class theatre. Defendant has no knowledge or information to form a belief as [Vol. 36] to the allegations in said paragraph to the effect that the distributors licensed or offered to license the California Theatre feature motion pictures upon first run or that said distributors granted, after negotiation or otherwise, to plaintiff or to plaintiff's theatre, when it has been licensed first run, any clearance or protection with respect to any subsequent run exhibition in said area and upon that ground denies each and every such allegation. Defendant denies that the right to negotiate with a distributor for first run exhibition in said San Bernardino competitive area or to negotiate for a reasonable period of clearance or priority of run over subsequent exhibitions of the same

motion picture in said area is a property right of plaintiff or of plaintiff's California Theatre and denies that the deprivation of any such alleged property right would result in any monetary damage or loss to plaintiff.

## V.

Answering Paragraph IX of plaintiff's complaint, defendant admits that defendant's Drive-In Theatre has a capacity of approximately 1,000 automobiles, is located approximately 11 miles from plaintiff's California Theatre on San Bernardino-Los Angeles Freeway No. 99, and caters exclusively to patrons in motor vehicles. Defendant has no knowledge or information upon which to form a belief as to the allegation in plaintiff's complaint to the effect that defendant's theatre is located within the "San Bernardino competitive area" as said term is used in plaintiff's complaint and therefore denies said allegation, but in this connection, defendant denies specifically that defendant's Belair Theatre is in substantial competition with plaintiff's California Theatre. Defendant has no knowledge or information to form a belief as to the allegations in Para-[fol. 37] graph IX of the complaint to the effect that the average driving time between defendant's theatre and plaintiff's California Theatre is not more than 20 minutes and upon that ground denies said allegation.

## VI.

Answering Paragraph X of plaintiff's complaint, defendant admits that there are a number of conventional and drive-in theatres located in the city limits of San Bernardino within a distance of 12 miles from defendant's Belair Theatre and within a distance of 12 miles from plaintiff's California Theatre, and in this connection, alleges that there are conventional and drive-in theatres outside the city limits of San Bernardino and located at a distance greater than 12 miles from defendant's Belair Theatre. Defendant has no knowledge or information upon which to base a belief to the effect that there are conventional and drive-in theatres located within the San Bernardino competitive area, as that term is used in the complaint and



in Paragraph X, and upon this ground denies said allegation. In this connection, defendant alleges that there are no drive-in theatres located within the city of San Bernardino which are in substantial competition with plaintiff's California Theatre.

## VII.

Answering Paragraph XI of plaintiff's complaint, defendant denies that there is any actual controversy relating to any legal rights or liabilities of plaintiff or defendant existing and arising out of the facts alleged in said Paragraph XI or in the complaint.

Defendant has no knowledge or information upon which to base a belief as to the allegations of the contentions of plaintiff set forth in Paragraph XI, page 8, lines 19 [fol. 38] through 31 and page 9, lines 1 through 6, and upon that ground, denies each and every said allegation. Defendant denies each and every allegation contained in Paragraph XI, page 8, lines 9 through 18, except that defendant admits that it contends its theatre is not in substantial competition with plaintiff's California Theatre. In this connection, defendant alleges that it contends that its theatre is not in substantial competition with plaintiff's California Theatre, or the Tri-City Theatre, or the Baseline Theatre, or the Warner's Ritz Theatre, or the Studio Theatre. Defendant alleges further that it contends that it may not be deprived of the opportunity of licensing feature motion pictures on an availability equal to Los Angeles first run or day and date with San Bernardino first run as a result of a contract, combination or conspiracy or attempt to monopolize in violation of the antitrust laws of the United States, and further contends that it may not be deprived of that opportunity as a result of any agreement between a distributor and any of the theatres above mentioned granting clearance to said theatres over defendant's Belair Theatre.

## VIII.

Answering Paragraph XII of plaintiff's complaint, defendant denies each and every allegation contained therein and the whole thereof.

In further answer to plaintiff's allegations in Paragraph XII, to the effect that threats and duress and coercion upon the distributors arising out of and resulting from alleged threats of litigation by the defendant, have threatened to and have in fact deprived plaintiff and its said California Theatre of the right to negotiate for motion pictures upon their first run in the San Bernardino area and to negotiate for clearance over theatres, including defendant's Belair [fol. 39] Drive-In Theatre, in competition with plaintiff's said California Theatre upon said first run, defendant alleges as follows:

A. That beginning at a time unknown to defendant, but no later than 1956, plaintiff, Fox West Coast Theatres Corp., intervenor, Pacific Drive-In Theatres Corp., together with Stanley-Warners Corp., a corporation operating the Warner's Ritz Theatre in San Bernardino and other theatres in Southern California, and Paramount Film Distributing Corporation, United Artists Corp., Twentieth Century-Fox Film Corp., RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., and Loew's, Inc., entered into a continuing agreement, combination and conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act and a continuing combination and conspiracy to monopolize and to attempt to monopolize and an actual monopolization of trade and commerce in violation of said Section 2 of said Sherman Act. That said unlawful combination, conspiracy, attempt to monopolize and monopolization consisted of a continuing agreement to do the following things:

1. To fix a system of runs and clearances in the San Bernardino area in favor of the theatres of Fox West Coast Corp., Pacific Drive-In Theatres Corp., and Stanley-Warners Corporation, and designed to confer a monopoly of first run exhibition and first run patronage upon the theatres of Fox West Coast Theatres Corp., Pacific Drive-In Theatres Corp., and Stanley-Warners Corporation, and to protect said theatres from competition of independent theatres, including defendant's Belair Theatre.

2. To allocate the first run exhibition of feature motion pictures on their first run release in San Bernardino and

[fol. 40] in other areas where plaintiff, Fox West Coast Theatres Corp.; and intervener, Pacific Drive-In Theatres Corp., both operate theatres so that the feature motion pictures of Twentieth Century-Fox Film Corp. and United Artists Corp. would be licensed to the plaintiff, Fox West Coast Theatres Corp., and so that the feature motion pictures of Warner Brothers Pictures Distributing Corp. would be licensed to the theatres of Stanley-Warner wherever Stanley-Warner operated theatres on first run or would be licensed to intervener, Pacific Drive-In Theatres Corp., where Stanley-Warner did not operate theatres on first run, and so that the feature motion pictures of Loew's, Inc., Paramount Film Distributing Corp. and RKO Radio Pictures, Inc., would be licensed to Pacific Drive-In Theatres Corp. wherever said corporation operated first run theatres.

3. That Fox West Coast Theatres Corp., intervener, Pacific Drive-In Theatres Corp., and Stanley-Warner Corporation would refrain from competing with each other for first run features in San Bernardino in accordance with the allocation of first run features described above.

4. To impose clearance in favor of said protected theatres of Fox West Coast Theatres Corp., Pacific Drive-In Theatres Corp., and Stanley-Warner Corporation in San Bernardino against independent outsiders, including defendant's Belair Theatre, for the purpose of protecting the monopoly of first run exhibition and first run patronage conferred on the theatres of Fox West Coast Theatres Corp., Pacific Drive-In Theatres Corp., and Stanley-Warner Corporation, and for the purpose of protecting said theatres from competition.

[fol. 41] 5. To discriminate against independent theatres, including defendant, in San Bernardino, in the grant of run, clearance and rental terms in the licensing of first run feature motion pictures.

6. That said first system of runs and clearances, allocation of first run exhibition, agreement not to compete, clearances and discriminations should be established and maintained with the purpose and effect of establishing and

maintaining a monopoly of first run exhibition and first run patronage in San Bernardino and of excluding independent theatres, including defendant, from the opportunity of obtaining said pictures on a first run availability and to prevent independent theatres, including defendant, from licensing first run pictures under fair competitive conditions.

7. That Fox West Coast Theatres Corp., Pacific Drive-In Theatres Corp., and Stanley-Warner Theatres Corp., in conspiracy with the distributors enumerated in this Paragraph VIII, did the things herein set forth which they agreed to do. That the purpose and effect of said combination and conspiracy was to deprive independent theatres in San Bernardino, including defendant, of an opportunity to obtain said pictures on first run availability and to deprive independent theatres, including defendant, of an opportunity to obtain pictures under fair competitive conditions.

8. In further answer to plaintiff's allegations in Paragraph XII to the effect that acts of defendant have deprived plaintiff and its California Theatre of the right to negotiate for an exclusive first run and to negotiate for clearance, defendant alleges that insofar as plaintiff, Fox West Coast Theatres Corp., either before the opening of defendant's Belair Theatre, or subsequent thereto, obtained for its Fox California Theatre an exclusive first run or [fol. 42] obtained clearance with respect to the feature motion picture of any distributor enumerated in this Paragraph VIII, said plaintiff, Fox West Coast Theatres Corp., obtained said exclusive first run and such clearance for its theatre pursuant to the conspiracy described in this Paragraph VIII in violation of the antitrust laws.

9. That, in further answer to plaintiff's allegations in Paragraph XII to the effect that acts of the defendant have threatened to and have in fact deprived plaintiff and its California Theatre of the right to negotiate for motion pictures upon first run and to negotiate for clearance, defendant alleges that insofar as said plaintiff, Fox West Coast Theatres Corp., since the opening of defendant's Belair Theatre, did not license the product of any of the



distributors for the first run exhibition, said failure to license the said product on first run was pursuant to the allegation of product, agreement not to compete and conspiracy as described in this Paragraph VIII in violation of the antitrust laws.

#### FIRST AFFIRMATIVE DEFENSE.

#### IX.

That this Court has no jurisdiction of the subject matter of plaintiff's complaint.

#### SECOND AFFIRMATIVE DEFENSE.

#### X.

That the allegations of plaintiff's complaint fail to state a claim upon which relief can be granted.

#### THIRD AFFIRMATIVE DEFENSE.

#### XI.

Defendant alleges as its third affirmative defense the allegations contained in Paragraph VIII-A, 1 through 9, and incorporates herein said allegations as if fully set forth.

#### [fol. 43] COUNTER-CLAIM AND CROSS-CLAIM.

Defendant, Beacon Theatres Corporations, complains of plaintiff, Fox West Coast Theatre Corporation, and intervening defendant, Pacific Drive-In Theatres Corporation, and each of them, by way of counter-claim and cross-claim as follows:

#### I.

#### JURISDICTION AND VENUE.

A. This counter-claim and cross-claim is filed, and this cause of action arises under the laws for the protection of trade and commerce against restraints and monopolies, and more particularly under the provisions of law contained in Title 15 of the United States Code, including Sections 1 and 2 of the Act of Congress known as the

Sherman Act (15 USCA, Sections 1 and 2; 26 Stat. 209), and Section 4 of the Act of Congress, known as the Clayton Act (15 USCA, Section 15; 38 Stat. 731).

B. The business of producing, distributing and exhibiting motion pictures involves a constant, continuous stream of trade and commerce between the states of the United States consisting of the solicitation and the making of contracts for the future delivery over periods of time of films to be produced and delivered; the transportation of negative films from the studios to the laboratories where positive prints of the motion picture films are prepared, and from there shipped to film exchanges throughout the United States; the continuous distribution of said films from the exchanges to and from motion picture theatres located in the areas served by the respective exchanges; the interchange of said films between each exchange and other exchanges of the same distributor located in other states of the United States; and finally the shipment of said films from the exchanges throughout the United States to points [fol. 44] within the State of New York or elsewhere for scrapping. Plaintiff, intervening defendant and all of the co-conspirators are engaged directly in trade and commerce among the various states, and the practices hereinafter mentioned operated directly upon the above-described course of interstate business.

C. Plaintiff and intervening defendant corporations each maintain an office and transact business within the Southern District of California.

D. The purpose of this counter-claim and cross-claim is to recover damages against plaintiff, Fox West Coast Theatres Corporation, and intervening defendant, Pacific Drive-In Theatres Corporation, for injury to defendant in its business and property, which injury resulted from the violations of the antitrust laws of the United States by plaintiff, Fox West Coast Theatres Corporation, and intervening defendant, Pacific Drive-In Theatres Corporation, and to restrain and enjoin plaintiff, Fox West Coast Theatres Corporation, and intervening defendant, Pacific Drive-In Theatres Corporation, from continuing the illegal

monopoly and the combination and conspiracy in restraint of trade and commerce as herein after alleged.

## II.

### DEFENDANT.

Defendant, Beacon Theatres Corporation, hereinafter referred to as "Beacon", is a corporation organized and existing under and by virtue of the laws of the State of California and is engaged in the business of owning and operating the Belair Drive-In Theatre in San Bernardino County, State of California, in the Southern District of California.

[fol. 45]

## III.

### PLAINTIFF AND INTERVENING DEFENDANT.

A. Plaintiff, Fox West Coast Theatres Corp., hereinafter referred to as "Fox West Coast", is a corporation organized and existing under and by virtue of the laws of the State of Delaware. Fox West Coast, during the period covered by the counter-claim and cross-claim, was engaged in the business of buying, booking and exhibiting motion pictures and operating motion picture theatres, either directly or through subsidiary or associated companies, in various parts of the United States, including Los Angeles, California, and San Bernardino, California. During the period covered by this counter-claim and cross-claim, Fox West Coast had an interest in at least 150 theatres.

B. Intervening defendant, Pacific Drive-In Theatres Corporation, hereinafter referred to as "Pacific", is a corporation organized and existing under the laws of the State of California. During the period covered by this counter-claim and cross-claim, said intervening defendant was engaged in the business of buying, booking and exhibiting motion pictures and operating motion picture theatres, both drive-in theatres and conventional theatres, throughout the State of California, including San Bernardino, California, either directly or through subsidiary or associated companies. During the period referred to herein, Pacific had an interest in at least 40 theatres.

## IV.

## CO-CONSPIRATORS.

A. Stanley-Warner Corporation, designated as a co-conspirator herein, and hereinafter referred to as "Stanley-Warner", is a corporation organized and existing under the laws of the State of Delaware. Said co-conspirator was, [fol. 46] during the entire period covered by this counter-claim and cross-claim, engaged in the business of buying, booking and exhibiting motion pictures and operating motion picture theatres in San Bernardino, California, Los Angeles, California, in other areas of the State of California, and in other areas throughout the United States, either directly or through subsidiary or associated companies. During the entire period covered by this counter-claim and cross-claim, Stanley-Warner was one of the largest exhibitor circuits in the United States.

B. National Theatres, Inc., designated as a co-conspirator herein, and hereinafter referred to as "National", is a corporation organized and existing under the laws of the State of Delaware. Said co-conspirator was, during the entire period covered by this counter-claim and cross-claim, the parent corporation of plaintiff, Fox West Coast Theatres Corporation, and was in the business of buying, booking and exhibiting motion pictures, and operating motion picture theatres in San Bernardino, California, Los Angeles, California, and in other areas of the State of California and in other areas throughout the United States either directly or through subsidiary or associated companies.

C. The following named corporations, all designated co-conspirators herein, are corporations organized and existing under the laws of either the States of Delaware or New York, as follows:

Paramount Film Distributing Corp., organized under the laws of the State of New York; hereinafter referred to as "Paramount";

RKO Radio Pictures, Inc., organized under the laws of the State of Delaware; hereinafter referred to as "RKO";

[fol. 47] Warner Bros. Pictures, Inc., organized under the laws of the State of Delaware; hereinafter referred to as "Warner";

Twentieth Century-Fox Film Corp., organized under the laws of the State of New York; hereinafter referred to as "20th";

Loew's, Inc., organized under the laws of the State of Delaware; hereinafter referred to as "Loew's";

United Artists Corporation, organized under the laws of the State of Delaware; hereinafter referred to as "United Artists".

The John Doe individual and corporate co-conspirators are sued herein under fictitious names for the reason that said co-conspirators' true names are presently unknown to defendant. When defendant ascertains the true names of said co-conspirators, leave will be asked of Court to amend this complaint.

Each of said corporations and individuals designated herein as co-conspirators, during the entire period covered by this counter-claim and cross-claim, were engaged in the business of producing and distributing for exhibition feature motion pictures in various parts of the United States, including the State of California and the Southern District of California, and in addition to said activities, during said period, co-conspirator, Loew's, Inc., was engaged in the business of exhibiting motion pictures in various parts of the United States. During said period, Loew's, Inc., was one of the largest exhibitor circuits in the United States.

D. The foregoing corporations, alleged to have been engaged in the business of distributing or exhibiting feature motion pictures, are hereinafter sometimes referred to as "The Co-conspirators".

[fol. 48] E. The co-conspirators alleged to have been engaged in the business of producing and distributing motion pictures during the entire period covered by this counter-claim and cross-claim, controlled and distributed substantially all of the feature motion pictures suitable for exhibition on first run in San Bernardino and throughout the United States.



## BACKGROUND OF THE CONSPIRACY.

A. Fox West Coast and its parent and affiliated corporations have, over the course of a number of years, acquired ownership of a large number of conventional motion picture theatres in the United States. In Southern California, Fox West Coast is the largest circuit of conventional theatres. This exhibition circuit has included theatres located in substantially all of the metropolitan centers in Southern California, including Los Angeles, Pasadena, Inglewood, Glendale, Long Beach, Huntington Park, Compton, Westchester, San Bernardino, Bakersfield, Beverly Hills. In each of these metropolitan centers, Fox West Coast has owned and does now own motion picture theatres located in the downtown areas of these metropolitan centers, which theatres operate regularly on a policy of first run exhibition.

B. Since 1949, Pacific has acquired the ownership or operation of a large number of drive-in theatres and some conventional theatres, numbering approximately 40. This drive-in circuit is the dominant and largest drive-in circuit in Southern California. The theatres of Pacific are located in areas away from the downtown areas of the metropolitan centers in which they operate.

C. During the period beginning at least in 1949, there occurred in Southern California in these metropolitan [fol. 49] centers an extensive shift of population away from the downtown areas and into outlying and suburban areas of the metropolitan centers. There also occurred a large additional population increase in these suburban areas. By reason of this population shift and population increase it became even more economically unreasonable to limit the number of theatres playing a picture on first run to a single theatre and restricting the development of day and date exhibition.

D. In San Bernardino, Fox West Coast has owned and does now own the Fox California Theatre, located in downtown San Bernardino, operating on a first run policy. Stanley Warner has owned and does now own and operate the Warner's Ritz Theatre, located in downtown San Ber

nardino, on a first run policy. Pacific has owned and does now own and operate two drive-ins—the Tri-City Drive-In Theatre and the Baseline Drive-In Theatres—in areas away from the downtown centers. Fox, Stanley-Warner and Pacific have operated said theatres upon an exclusive first run basis except that Pacific has at times operated its Tri-City Theatre day and date with its conventional Studio Theatre in San Bernardino. Defendant, Beacon Theatres, Inc., has operated the Belair Drive-In Theatre since November, 1956, and said Belair Drive-In Theatre is not in substantial competition with any of the aforesaid theatres of Fox West Coast, Stanley-Warner or Pacific.

E. For the purpose of establishing and maintaining a monopoly of exclusive first run exhibition and for the purpose of establishing and maintaining a monopoly of first run patronage in the San Bernardino area, Fox West Coast, Pacific and Stanley-Warner entered into a combination, conspiracy, attempt to monopolize and monopolization [fol. 50] among themselves and with the co-conspirators as is hereinafter alleged.

## VI.

A. That beginning at a time unknown to defendant, but no later than 1956, plaintiff, Fox West Coast Theatres Corp., intervener, Pacific Drive-In Theatres Corp., together with Stanley-Warner Corp., a corporation operating the Warner Ritz Theatre in San Bernardino and other theatres in Southern California, and Paramount Film Distributing Corporation, United Artists Corp., Twentieth Century-Fox Film Corp., RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., and Loew's, Inc., entered into a continuing agreement, combination and conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act and a continuing combination and conspiracy to monopolize and to attempt to monopolize and an actual monopolization of trade and commerce in violation of Section 2 of said Sherman Act. That said unlawful combination, conspiracy, attempt to monopolize and monopolization consisted of a continuing agreement to do the following things:

1. To fix a system of runs and clearances in the San Bernardino area in favor of the theatres of Fox West

Coast Theatres Corp., Pacific Drive-In Theatres Corp., and Stanley-Warner Corporation, and designed to confer a monopoly of first run exhibition and first run patronage upon the theatres of Fox West Coast Theatres Corp., Pacific Drive-In Theatres Corp., and Stanley-Warner Corporation, and to protect said theatres from competition of independent theatres, including defendant's Belair Theatre.

2. To allocate the first run exhibition of feature motion pictures on their first run releases in San Bernardino and in other areas where plaintiff, Fox West Coast Theatres [fol. 51] Corp., and the intervener, Pacific Drive-In Theatres Corp., both operate theatres so that the feature motion pictures of Twentieth-Century-Fox Film Corp. and United Artists Corp. would be licensed to the plaintiff, Fox West Coast Theatres Corp., and so that the feature motion pictures of Warner Brothers Pictures Distributing Corp. would be licensed to the theatres of Stanley-Warner wherever Stanley-Warner operated theatres on first run and would be licensed to intervener, Pacific Drive-In Theatres Corp., where Stanley-Warner did not operate theatres on first run, and so that the feature motion pictures of Loew's, Inc., Paramount Film Distributing Corp. and RKO Radio Pictures, Inc. would be licensed to Pacific Drive-In Theatres Corp. wherever said corporation operated first run theatres.

3. That Fox West Coast Theatres Corp., intervener, Pacific Drive-In Theatre Corp. and Stanley-Warner Corporation would refrain from competing with each other for first run features in San Bernardino in accordance with the allocation of first run features described above.

4. To impose clearance in favor of said protected theatres of Fox West Coast Theatres Corp., Pacific Drive-In Theatres Corp. and Stanley-Warner Corporation in San Bernardino against independent outsiders, including defendant's Belair Theatre, for the purpose of protecting the monopoly of first run exhibition and first run patronage conferred on the theatres of Fox West Coast Theatres Corp., Pacific Drive-In Theatres Corp. and Stanley-Warner Corporation, and for the purpose of protecting said theatres from competition.

5. To discriminate against independent theatres, including defendant, in San Bernardino, in the grant of run, clearance and rental terms in the licensing of first run feature motion pictures.

[fol. 52] 6. That said fixed system of runs and clearances, allocation of first run exhibition, agreement not to compete, clearances and discriminations should be established and maintained with the purpose and effect of establishing and maintaining a monopoly of first run exhibition and first run patronage in San Bernardino and of excluding independent theatres, including defendant, from the opportunity of obtaining said pictures on a first run availability and to prevent independent theatres, including defendant, from licensing first run pictures under fair competitive conditions.

7. That Fox West Coast Theatres Corp., Pacific Drive-In Theatres Corp., and Stanley-Warner Theatres Corp., in conspiracy with the distributors enumerated in this Paragraph VI. did the things herein set forth which they agreed to do. That the purpose and effect of said combination and conspiracy was to deprive independent theatres in San Bernardino, including defendant, of an opportunity to obtain said pictures on first run availability and to deprive independent theatres, including defendant, of an opportunity to obtain pictures under fair competitive conditions.

B. The contract, combinations and conspiracy of Fox West Coast, Pacific and the co-conspirators described herein had, as was intended, the following injurious effects, among others:

1. Competition was eliminated among Fox West Coast, Pacific and the co-conspirators in the distribution and exhibition of motion pictures in the San Bernardino area.

2. The market for first run exhibition in the San Bernardino area was monopolized by Fox West Coast, Pacific and Stanley-Warner.

[fol. 53] 3. The flow of interstate trade and commerce was unreasonably restrained.

4. The public was deprived of the benefits of free and open competition.



C. The contracts, combination and conspiracy of Fox West Coast, Pacific and the co-conspirators, as hereinabove described, had, as was intended, the following injurious effects upon the operation of defendant's theatre:

1. Said theatre was prevented from licensing feature motion pictures distributed by the distributors named as co-conspirators herein on a first run availability or day and date first run availability.

2. Said theatre was forced to operate with an inadequate supply of feature motion pictures, thus reducing the potential of defendant's Belair Theatre to obtain receipts at the box office.

3. While said theatre of defendant was denied the right to play pictures of the co-conspirators on first run, Fox West Coast, Pacific and Stanley-Warner were able and were permitted to operate theatres on first runs, all involving discrimination against and injury to defendant's theatre.

4. Defendant has been and was by virtue of said conspiracy excluded by Fox West Coast, Pacific and the co-conspirators from the opportunity to procure high-class feature motion pictures under fair competitive conditions in said area.

D. As a result of the unlawful contracts, combinations and conspiracy of Fox West Coast, Pacific and the co-conspirators, as hereinabove set forth, and by reason of the wrongful acts done pursuant thereto; as herein alleged defendant was injured in its business and property in the sum of one hundred thousand dollars (\$100,000.00).

[fol. 54] Wherefore, defendant prays as follows:

1. That the Court enter judgment for the defendant and against plaintiff with respect to the cause of action asserted in plaintiff's complaint;

2. That defendant have judgment against Fox West Coast Theatres Corp. and Pacific Drive-In Theatres Corporation in the sum of three hundred thousand dollars (\$300,000.00), being threefold the damages sustained by defendant, together with costs of suit and reasonable attor



ney's fees, pursuant to the laws of the United States, as provided in such cases;

3. That Fox West Coast and Pacific Drive-In Theatres Corp. be enjoined from further carrying out the acts done pursuant to the conspiracy as alleged in defendant's answer, counter-claim and cross-claim;

4. That defendant be granted such other and further relief as to the Court shall be deemed just and equable.

WELLER & CORINBLIT,

By /s/ FRED A. WELLER,

By /s/ JACK CORINBLIT,  
Attorneys for Defendant.

Defendant demands a Jury Trial with respect to the complaint, answer, counter-claim and cross-claim.

[fol. 55]

#### EXHIBIT E-2 TO PETITION

Law Offices

Newlin, Tackabury & Johnston,  
1100 Roosevelt Building,  
Los Angeles 17,  
MUTual 7205,  
Attorneys for Plaintiff.

United States District Court, Southern District of California, Central Division.

Fox West Coast Theatres Corporation, a corporation, Plaintiff, vs. Beacon Theatres, Inc., a corporation, Defendant. Civil Action No. 20658-HW.

MEMORANDUM IN SUPPORT OF MOTION TO HAVE DECLARATORY JUDGMENT ISSUES TRIED TO THE COURT AND NOT TO A JURY.

Defendant by its counsel has demanded a jury trial not only upon the issues raised by its cross-claim for treble

damages under the anti-trust laws but upon the issues raised by the complaint and answer for a declaratory judgment. Plaintiff resists the demand for a jury upon the Declaratory Judgment issues on the grounds (1) that the issues presented are essentially equitable rather than legal in nature, and (2) that the right to a jury trial in an action for a Declaratory Judgment such as is presented in the instant case is not an action which by the Constitution of the United States or by statute is triable to a jury.

*The Issues Presented Are Essentially Equitable  
in Nature.*

Professor Moore points out in 5 Moore's Federal Practice, Second Edition, page 212. *et seq.*, that an action for [fol. 56] a declaratory judgment is a statutory remedy, unknown at common law, and is in its nature neither legal nor equitable, but operates in both areas. Accordingly, it is the basic nature of the issue presented which determines the right of jury trial when demanded.

"The basic nature of the issue determines the right of jury trial when demanded. Thus if the action is properly one for the cancellation of an instrument and hence equitable, no right of jury trial is gained by asserting that the action 'is really in the nature of a declaratory judgment'. And where the complaint is framed along equitable lines looking to injunctive relief, both prohibitory and mandatory, as well as an accounting, together with declaratory relief, the issues raised by the complaint are equitable." (Page 213.)

In the complaint at bar it is alleged that the defendant has threatened both plaintiff and the distributors of motion pictures that if plaintiff's California Theatre is granted any clearance over defendant's Bel-Air Theatre, or is granted a prior run, such action will be deemed by defendant to be an overt act pursuant to a conspiracy in violation of the anti-trust laws, and that plaintiff will be subjected to an action for treble damages under Section 4 of the Clayton Act. The complaint goes on to allege that



said threats and the duress and coercion upon the distributors of motion pictures arising out of these threats of litigation threaten to and have in fact deprived plaintiff and its California Theatre of the right to negotiate for motion pictures upon their first run in the San Bernardino area and to negotiate for clearance over other theatres, including defendant's Bel-Air Theatre. That plaintiff is without any speedy or adequate remedy at law and will be [fol. 57] irreparably harmed unless defendant is restrained and enjoined from instituting any action under the anti-trust laws against plaintiff and the distributors of motion pictures. It seems clear, therefore, that the complaint, while seeking an adjudication as to the existence or non-existence of substantial competition between the two theatres involved, is essentially equitable in nature. No damages are sought, but rather an injunction against the continuance of defendant's threats of litigation addressed to plaintiff and the suppliers of motion pictures.

Furthermore, the sole occasion for having to seek an adjudication of the existence or non-existence of substantial competition arises out of and is occasioned by the interpretation and enforcement of an equitable and injunctive decree in *United States v. Paramount Pictures, Inc., et al.*, under which the major distributors of motion pictures are enjoined from granting any clearance over theatres not in substantial competition.

*Neither the Seventh Amendment to the Constitution nor the Declaratory Judgment Act Gives a Right to a Jury Trial.*

This action for declaratory relief is, so far as we know, entirely *sui generis* and arises out of one of the injunctive provisions in the decree in *U. S. v. Paramount*. A declaration as to whether certain theatres are or are not in substantial competition with each other is a proceeding manifestly unknown to the common law.

Rule 38(a) states "the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate". The rule does not enlarge upon the

right to a jury trial given by the Seventh Amendment,\* [fol. 58] and the Declaratory Judgment Act (28 U.S.C. Section 2201) does not affirmatively grant the right to a jury trial.

The Seventh Amendment provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved \* \* \*". As Professor Moore says (5 Moore's Federal Practice, Second Edition, page 79):

"By its terms the Seventh Amendment applies only to 'Suits at common law, where the value in controversy shall exceed twenty dollars'. Since there was great diversity among the states concerning the right to jury trial and this led to an omission of any guarantee of jury trial in civil actions in the original Constitution, the common law alluded to in the Amendment is the common law of England as of the time (1791) the Amendment was adopted. This principle does not, however, preclude the application of the Seventh Amendment to newly created rights of a legal nature, which would under common law principles be enforced in a suit at common law. Since the Amendment deals only with suits at common law, it has no application to suits in equity or admiralty, or to administrative proceedings."

An action to declare whether there exists substantial competition between two theatres within the circumscriptions [fol. 59] of a prior equity decree (*U. S. v. Paramount Pictures, Inc., et al.*) and to enjoin defendant from continuing threats of litigation for violation of the anti-trust laws, is certainly not a "suit at common law", and we accordingly

\* *Arnstein v. Twentieth Century-Fox Film Corp.* (D. C. N. Y.), 3 F. R. D. 58, states (p. 59):

"Rule 38 of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, prescribes the steps to be taken for assuring enjoyment of the right to a jury trial, if such right exist; but that rule did not create the right. The source of the right is the law (constitutional and statutory) as it stood preceding the adoption of the rules."

submit that defendant's demand for a jury upon the issues raised by the complaint and answer thereto is improper and beyond the power of the Court to grant.

Comparable is the statement of Mr. Chief Justice Hughes in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. page 1, 81 L. Ed. 893, to a contention that the finding of unfair labor practices by the National Labor Relations Board and order of reinstatement with back wages violated the defendant's right to jury trial page 918 of 81 L. Ed., page 48 of 301 U. S.):

"The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

Respectfully submitted,

NEWLIN, TACKABURY & JOHNSTON

By FRANK R. JOHNSTON  
Frank R. Johnston

By HUDSON B. COX  
Hudson B. Cox

Attorneys for Plaintiff and Cross-Defendant  
Fox West Coast Theatres Corporation.



[fol. 60]

## EXHIBIT F TO PETITION.

In the United States District Court, Southern District  
of California, Central Division.

Honorable Harry C. Westover, Judge Presiding.

Fox West Coast Theatres Corporation, Plaintiff, vs.  
Beacon Theatres, Inc., Defendant.

Pacific Drive-In Theatres Corporation, Intervening De-  
fendant. No. 20658-HW Civil.

## REPORTER'S TRANSCRIPT OF PROCEEDINGS.

Los Angeles, California.  
Monday, March 18, 1957

## Appearances:

For the Plaintiff: Frank Johnston, Esq., and Hudson  
Cox, Esq.

For the Defendant Beacon Theatres, Inc.: Fred Weller,  
Esq.

For the Intervening Defendant: Harry Swerdlow,  
Esq.

Los Angeles, California, March 18, 1957,  
10:00 o'clock, A. M.

The Clerk: No. 4, 20658, Fox West Coast Theatres  
Corporation vs. Beacon Theatres, Inc., et al.

Mr. Weller: Ready, your Honor.

Mr. Johnston: Ready.

The Court: Mr. Johnston, I read the authorities that you  
submitted.

Mr. Johnston: Yes, sir.

The Court: And I think that the only thing you have been  
able to convince me of is that in a patent case the counter-  
[fol. 61] claim is permissive. The cases that have been  
cited to me don't go any further than patent cases.

Mr. Johnston: Well, those are the only cases we have  
been able to discover, your Honor.

The Court: I thought they were.

Mr. Johnston: So I am not going to base an argument on anything other than those cases, because the way we read those cases—and I acknowledge this to be an exception to the general rule—is that the filing of an action under the Sherman or Clayton Acts is an exception and may be filed independently and does not have to be filed. I read the cases as not limiting it to a patent situation, but I must confess that the cases we have cited are all patent cases.

The Court: I am convinced in my own mind, and I may be wrong, that that is the rule in patent cases. I am not convinced that that is the rule in any other kind of case.

Mr. Johnston: I admit the cases cited are patent cases. I have no others, your Honor.

The Court: I am not satisfied that this is a permissive counterclaim or cross-claim. I am not satisfied it is mandatory to file it. However, inasmuch as I am not satisfied as to what it is, I think I should leave it in. I should not dismiss it.

However, I think I have a right to divide the case, and we will try the issue on the area of reasonable competition first. I think that is an equitable proceeding and no jury is allowed, so I will deny the jury in that phase of the case. I will make an order separating the issues for the trial.

I will strike the defendants' demand for a jury trial upon the question of declaratory relief that was filed. I will set that down for hearing at an early day, and, also, [fol. 62] I will grant the motion striking from the answer the allegations set up by plaintiff relative to the antitrust proceedings.

So the only thing that I am going to try is this question of declaratory relief relative to the question of reasonable competition. When we determine that, and if the court finds that these theatres are within the realm of reasonable competition, then we will proceed upon the antitrust theory of the case.

Mr. Johnston: Very well, your Honor. Would the court desire to have a—

The Court: Will you prepare the order?

Mr. Johnston: I will, your Honor.

The Court: I will continue this matter to April 1st for setting. We have a big setting calendar on April 1st.

Mr. Swerdlow: Does the court desire any authorities on the question of declaratory relief actions receiving priority in trial date?

The Court: Yes. If you have got any authorities on that line, I would like to have them, because we have a number of cases and very few open dates for trial.

Mr. Johnston: I think the rules themselves so provide.

Mr. Swerdlow: We will submit a memorandum.

The Court: I should like you to do that.

Mr. Johnston: Just so the court may be thinking about it, I call the court's attention to the last sentence in Rule 57 which reads:

"The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar."

The Court: That is within the discretion of the court isn't it?

Mr. Johnston: That's right, your Honor.

[fol. 63] The Court: All right. It isn't mandatory.

The Clerk: I haven't sent them any notice for the first

April.

The Court: You come back here on the 1st of April and we will have it on the setting calendar.

Mr. Johnston: Thank you.

#### CERTIFICATE.

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 25th day of March 1957.

S. J. TRAINOR,  
Official Reporter.

[fol. 64]

## EXHIBIT G TO PETITION

## Law Offices

Newlin, Tackabury &amp; Johnston

1100 Roosevelt Building

Los Angeles 17

MUtual 7205

Attorneys for Plaintiff

United States District Court, Southern District of California, Central Division.

Fox West Coast Theatres Corporation, a corporation, Plaintiff, vs. Beacon Theatres, Inc., a corporation, Defendant.

Pacific Drive-In Theatres Corporation, Intervening Defendant. Civil Action No. 20658-HW.

## ORDER.

The motions of plaintiff Fox West Coast Theatres Corporation for an order (1) striking defendant's demand for jury trial upon the complaint and answer for declaratory judgment, (2) striking portions of defendant's answer, and (3) separating the declaratory judgment issues from defendant's cross-claim and counterclaim for treble damages under the anti-trust laws, having come on regularly for hearing in the above entitled court, Honorable Harry C. Westover, Judge presiding, plaintiff being represented by Messrs. Newlin, Tackabury & Johnston, by Frank R. Johnston and Hudson B. Cox, Esquires, defendant Beacon Theatres, Inc. being represented by Messrs. Weller & Corinblit, by Fred A. Weller, Esquire, and intervening defendant Pacific Drive-In Theatres Corporation being represented by Messrs. Swerdlow, Glikbarg & Nicholas, by Harry B. Swerdlow, Esq.; said motions having been set for hearing and heard by stipulation of the parties on [fol. 65] March 11, 1957, and having been thereafter continued to March 18, 1957, and the Court having considered said motions and the memoranda of plaintiff in support thereof and of defendant in opposition thereto, and being fully advised in the premises.

### It Is Now Therefore Ordered

1. That plaintiff's motion to strike defendant's demand for jury trial upon the complaint and answer for declaratory judgment be and the same is hereby granted and defendant's demand for a jury upon said issues be and the same is hereby stricken and the cause ordered to be tried to the court without a jury.

2. That plaintiff's motion to strike all of paragraph VIII of defendant's answer to complaint for declaratory judgment excepting the first three lines of said paragraph and to strike the third affirmative defense in said answer be and the same is hereby granted, and said portions of defendant's answer to plaintiff's complaint for declaratory judgment be and the same are hereby stricken.

3. That plaintiff's motion for a separation of the issues raised by the complaint for declaratory relief and answer thereto from the anti-trust issues raised by defendant's counterclaim and cross-claim be and the same is hereby granted, and it is ordered that the issues raised by the complaint for declaratory judgment and answers thereto of defendant Beacon Theatres, Inc. and of intervening defendant Pacific Drive-in Theatres Corporation be tried to the Court without a jury in advance of and separately from defendant's counterclaim and cross-claim for treble damages under the anti-trust laws.

4. It Is Further Ordered that said matter be placed on the Court's setting calendar for Monday, April 1, 1957, [fol.66] and that upon said date in the courtroom of the above entitled Court, at 10 o'clock A.M., said matter be set down for trial upon the complaint for declaratory judgment and answers thereto of defendant Beacon Theatres, Inc. and of intervening defendant Pacific Drive-in Theatres Corporation.

Dated, March ....., 1957.

U. S. District Judge.



Approved as to form.

Disapproved as to form.

WELLER & CORINBLIT

By.....  
Attorneys for defendant  
Beacon Theatres, Inc.

[fol. 67]

EXHIBIT H TO PETITION.

Law Offices  
Newlin, Tackabury & Jolinston  
1100 Roosevelt Building  
Los Angeles 17  
MUtual 7205  
Attorneys for Plaintiff

United States District Court, Southern District of California, Central Division.

Fox West Coast Theatres Corporation, a corporation, Plaintiff, vs. Beacon Theatres, Inc., a corporation, Defendant.

Pacific Drive-in Theatres Corporation, Intervening Defendant. Civil Action No. 20658-HW.

ANSWER OF PLAINTIFF AND CROSS-DEFENDANT, FOX WEST COAST THEATRES CORPORATION TO COUNTERCLAIM AND CROSS-CLAIM.

Plaintiff and cross-defendant Fox West Coast Theatres Corporation (hereinafter for convenience referred to simply as "plaintiff") answers the counterclaim and cross-claim of defendant and cross-claimant Beacon Theatres Corporation as follows:

I.

Denies each and every allegation contained in paragraph I A of said counterclaim and cross-claim.

## II.

Denies each and every allegation contained in paragraph I B of said counterclaim and cross-claim.

## III.

Denies each and every allegation contained in paragraph I D of said counterclaim and cross-claim.

[fol. 68]

## IV.

Admits the allegations of paragraph II of said counterclaim and cross-claim.

## V.

Admits the allegations of paragraph III A of said counterclaim and cross-claim, but in that regard alleges that during the period covered by said counterclaim and cross-claim plaintiff had an interest, directly or indirectly, in one hundred and forty-nine theatres.

## VI.

Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III B of said counterclaim and cross-claim.

## VII.

Answering paragraph IV A, plaintiff denies that it is or was a co-conspirator or that it has ever conspired as alleged in defendant's counterclaim and cross-claim. Further answering said paragraph, plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph.

## VIII.

Answering paragraph IV B of the counterclaim and cross-claim, plaintiff admits that National Theatres, Inc. is a corporation organized and existing under the laws of the State of Delaware, and that it is the parent corporation of plaintiff; denies that it was or is engaged in the business of buying, booking and exhibiting motion pictures, and in that respect alleges that said National Thea

tres, Inc. owns, wholly or in part, the stock of corporations which operate motion picture theatres.

Except as hereinabove expressly admitted, denies each and every allegation contained in paragraph IV B.

[fol. 69]

### IX.

Answering paragraph IV C of the counterclaim and cross-claim, plaintiff alleges that the corporations therein referred to were organized under the laws of the respective states as alleged in paragraph V of plaintiff's complaint for declaratory relief herein, and that said corporation during the period covered by the counterclaim and cross-claim were engaged in the business of producing and distributing or distributing motion pictures in various parts of the United States, including the State of California.

Except as hereinabove expressly admitted or alleged, denies each and every allegation contained in paragraph IV C.

### X.

Answering paragraph IV D, plaintiff denies that it is or was a co-conspirator or has ever conspired as alleged in defendant's counterclaim and cross-claim.

### XI.

Denies each and every allegation contained in paragraph IV E of said counterclaim and cross-claim, and in that respect alleges that Columbia Pictures Corporation, Universal Film Exchanges, Inc., and numerous other producers of motion pictures distribute motion pictures and license them for first-run exhibition in San Bernardino and throughout the United States.

### XII.

Answering paragraph V A of the counterclaim and cross-claim, plaintiff alleges that it owns, wholly or in part, the stock of corporations which operate motion picture theatres in the State of California and in Southern California, including the cities and suburban areas in said paragraph alleged.

[fol. 70] Except as hereinabove expressly admitted or alleged, denies each and every allegation contained in paragraph V A.

### XIII.

Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V B of said counterclaim and cross-claim.

### XIV.

Answering paragraph V C of the counterclaim and cross-claim, plaintiff admits that there has occurred a population increase in Southern California and that said population increase has occurred in each of the metropolitan centers referred to in said counterclaim and cross-claim.

Except as hereinabove admitted or alleged, denies each and every allegation contained in paragraph V C.

### XV.

Answering paragraph V D of the counterclaim and cross-claim, plaintiff admits that it is the owner and operator of the California Theatre located at 562 - 4th Street, in the City of San Bernardino, California, and that said theatre exhibits certain motion pictures on their first-run exhibition in San Bernardino. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph V D, except plaintiff denies that the Bel-Air Drive-In Theatre is not in substantial competition with plaintiff's California Theatre or with the other theatres in said paragraph referred to.

[fol. 71]

### XVI.

Plaintiff denies generally and specifically each and every allegation contained in paragraph V E of the counterclaim and cross-claim.

### XVII.

Plaintiff denies generally and specifically each and every allegation contained in paragraph VI of the counterclaim

and cross-claim and denies that defendant and cross-claimant has been injured or damaged in the sum of \$100,000, or in any amount at all.

## SECOND DEFENSE.

### L

The counterclaim and cross-claim does not state any claim against plaintiff upon which relief can be granted.

## THIRD DEFENSE.

### L

Defendant and cross-claimant with full knowledge of all material facts sought and accepted the benefits of the transactions of which it now complains, and is *in pari delicto* with plaintiff, with intervening defendant Pacific Drive-In Theatres Corporation, and with the alleged co-conspirators and each of them with respect to each and all of the acts which are alleged in the counterclaim and cross-claim to have been done.

That said defendant and cross-claimant has sought and accepted the benefits of the acts of which it now complains and is estopped from demanding any relief on account thereof.

[fol. 72] Wherefore, plaintiff prays that defendant's counterclaim and cross-claim be dismissed as to plaintiff, and that said defendant take nothing as against plaintiff thereby, and that plaintiff do have and recover from defendant and cross-claimant its costs herein incurred and to be taxed herein.

NEWLIN, TACKABURY & JOHNSTON,

By FRANK R. JOHNSTON,  
Frank R. Johnston,

By HUDSON B. COX  
Hudson B. Cox,

Attorneys for Plaintiff and Cross-Defendant  
Fox West Coast Theatres Corporation.



State of California, County of Los Angeles—ss.

Amy Gladys Johns, being first duly sworn says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 1100 Roosevelt Building, Los Angeles 17, California; that on the 10th day of April, 1957, affiant served the within Answer of Plaintiff and Cross-Defendant, Fox West Coast Theatres Corporation, to Counterclaim and Cross-Claim, on the defendant and on the intervenor in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said defendant and said intervenor, at the office address of said attorneys, as follows: (Here quote from envelope name and address of addressee.) "Messrs. Weller & Corinblit, Suite 1010, 3325 Wilshire Boulevard, Los Angeles 5, California"; "Harry B. Swerdlow, Esq., 232 North Canon Drive, Beverly Hills, California"; and by then sealing said envelope [fol: 73] and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

Subscribed and sworn to before me this 10th day of April, 1957.

*Notary Public in and for the County of  
Los Angeles, State of California.*

[SEAL]

[fol. 74]

## EXHIBIT I TO PETITION.

Law Offices  
 Swerdlow, Glikbarg & Nicholas  
 232 North Canon Drive  
 Beverly Hills California  
 CRestview 1-1147  
 BRadshaw 2-0141  
 Attorneys for Cross-Defendant,  
 Pacific Drive-In Theatres Corp.

United States District Court, Southern District of California, Central Division.

Fox West Coast Theatres Corporation, a corporation,  
 Plaintiff, vs. Beacon Theatres, Inc., a corporation, Defendant. No. 20658-WM.

ANSWER OF PACIFIC DRIVE-IN THEATRES CORP. TO CROSS-CLAIM  
 OF DEFENDANT BEACON THEATRES, INC.

Cross-Defendant Pacific Drive-In Theatres Corp. answers the cross-claim on file herein as follows:

FIRST DEFENSE TO CAUSE OF ACTION.

I.

With respect to paragraph I, subparagraph (a) of the cross-claim, answering cross-defendant admits that plaintiff seeks to invoke jurisdiction of this court under the statutes specified in said subparagraph and denies that it has violated such statutes or any of them and denies that it is liable to the plaintiff by reason of such statutes or for any other reason.

[fol. 75]

II.

Answering cross-defendant does not have any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I, subparagraphs (b) and (c) of the cross-claim except that it admits that it maintains an office and transacts business

within the Southern District of California; that motion pictures generally are not sold but are licensed to exhibitors; that film licenses are usually in writing and such licenses usually contain the name of the picture licensed and the terms agreed upon.

### III.

Answering cross-defendant denies each and every allegation contained in paragraph I, subparagraph (d) of the cross-claim.

### IV.

Answering cross-defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the cross-claim.

### V.

Answering cross-defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III, subparagraph (a) of the cross-claim.

### VI.

Answering cross-defendant denies each and every allegation contained in paragraph III, subparagraph (b) of the cross-claim except that it admits that for several years past it has been engaged in the business of licensing, booking motion pictures for and operating certain drive-in and conventional theatres located in Los Angeles, Orange [fol. 76] and San Bernardino counties and that said motion pictures have been exhibited in motion picture theatres belonging to other corporations some of which have been and others of which have not been associated with it.

### VII.

Answering cross-defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the cross-claim.

## VIII.

Answering cross-defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V, subparagraph (a) of the cross-claim.

## IX.

Answering cross-defendant denies each and every allegation contained in paragraph V, subparagraph (b) of the cross-claim except that it admits that it has been engaged in licensing, booking motion pictures for exhibition and operating various drive-in and some conventional theatres in Los Angeles, Orange and San Bernardino counties for several years past.

## X.

Answering cross-defendant denies each and every allegation contained in paragraph V, subparagraph (C) of the cross-claim except that it admits that for some years past the outlying suburban areas surrounding the city of Los Angeles and other surrounding metropolitan centers have become increasingly populated.

[fol. 77]

## XI.

Answering cross-defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph (d), of paragraph V of the cross-claim, except that it admits that it has been licensing, booking motion pictures and operating two drive-in theatres, Tri-City Drive-In Theatre and Baseline Drive-In Theatre, and one conventional theatre, Studio Theatre, in the greater San Bernardino area and that the Bel-Air Drive-In Theatre has been operated in the same greater San Bernardino area since November, 1956 in direct and substantial competition with its drive-in theatres, and has been operating its theatres in said area on a first, second and third run basis.

## XII.

Answering cross-defendant denies each and every allegation contained in paragraph V, subparagraph (e) of the cross-claim.

## XIII.

Answering cross-defendant denies each and every allegation contained in paragraph VI of the cross-claim.

FOR A FURTHER AND SECOND ADDITIONAL DEFENSE TO THE CROSS-CLAIM HEREIN, ANSWERING CROSS-DEFENDANT ALLEGES:

## I.

The cross-claim fails to state a claim against this answering defendant upon which relief can be granted.

[fol. 78] FOR A FURTHER AND THIRD ADDITIONAL DEFENSE TO THE CROSS-CLAIM HEREIN, ANSWERING CROSS-DEFENDANT ALLEGES:

## I.

Cross-plaintiff Beacon Theatres, Inc. voluntarily and knowingly consented to and participated in each and all of the acts complained of in the cross-claim and is in *pari delicto* with cross-defendants and each of them excepting this cross-defendant with respect to each and all of the acts and conduct which are alleged in the counterclaim and cross-claim to have been done and cross-plaintiff Beacon Theatres, Inc. has sought, solicited and accepted from cross-defendants except this cross-defendant the benefits of the several acts and conduct of which they are now complaining and have participated therein to the extent and degree that they are now estopped from asserting any claim, detriment, loss or injury by reason thereof.

WHEREFORE, this answering cross-defendant prays:

- (1) For dismissal of the complaint;
- (2) For cross-defendant's costs herein incurred;



(3) For such other and further relief as to the court may seem proper and just.

Dated: April ..., 1957.

SWERDLOW, GLIKBARG & NICHOLAS

By Harry B. Swerdlow  
Attorneys for Cross-Defendant Pacific  
Drive-In Theatres Corp.

[fol. 79] (Affidavit of Service by Mail—1013a, C. C. P.)

State of California, County of Los Angeles,—ss.

Rosi Edythe Katz, being first duly sworn says: That affiant is a citizen of the United States and a resident of the county aforesaid; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is: 232 North Canon Drive, Beverly Hills, California, that on the 8th day of April, 1957, affiant served the within Answer of Pacific Drive-In Theatres Corp. to Cross-Claim on the defendants in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said defendants at the office address of said attorneys as follows: "Weller & Corinblit, 250 North Hope Street, Los Angeles, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States mail at the city where is located the office of the attorney—for the person—by and for whom said service was made.

That there is a delivery service by United States mail at the place so addressed or\*\* there is a regular communication by mail between the place of mailing and the place so addressed, and

\* Here quote from envelope name and address of addressee.

\*\* When the letter is addressed to a post office other than where mailed from, strike out "and"; when addressed to the same city where mailed from, strike out "or."

Subscribed and sworn to before me this 10th day of April, 1957.

Rosi Edythe Katz  
F. N. Nicholas  
*Notary Public in and for said County  
and State of California.*

(SEAL)

[fel. 109]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Before: Lemmon, Barnes and Hamley, Circuit Judges.

MINUTE ENTRY OF ORDER GRANTING LEAVE TO FILE PETITION  
FOR WRIT OF MANDAMUS, AND DIRECTING RESPONSE THERETO  
—July 3, 1957

Upon consideration of the petition for writ of mandamus, It Is Ordered that respondent Hon. Harry C. Westover, Judge of the United States District Court of the Southern District of California, Central Division, show cause before this court why such petition should not be granted, on Tuesday, September 3, 1957, at the hour of 9:30 a.m., at its courtroom, 330 U. S. Post Office & Courthouse, San Francisco, California.

It Is Further Ordered that the typewritten response to such petition be served and filed by July 22, 1957.

[fol. 109a]

[File endorsement omitted]

[fol. 110]

No. 15614

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BEACON THEATRES, INC., a corporation, Petitioner,

v.

THE HON. HARRY C. WESTOVER, Judge of the United States  
District Court of the Southern District of California,  
Central Division, Respondent.

RESPONSE OF HARRY C. WESTOVER, JUDGE OF THE UNITED  
STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT  
OF CALIFORNIA

*To the Honorable Chief Judge of the United States Court  
of Appeals for the Ninth Circuit and to the Honorable  
the Judges of said Court:*

On July 3, 1957 this Court made its order granting leave to Beacon Theatres, Inc., a corporation, to file herein a Petition for Writ of Mandamus and directing respondent [fol. 111] above named to show cause before this Court why said Petition should not be granted. Now, agreeably to said order, said respondent within the time in said order provided, makes written response as follows:

1. On October 31, 1956 a complaint was filed in the United States District Court for the Southern District of California, Central Division, entitled and numbered "Fox West Coast Theatres Corporation, a corporation, Plaintiff, vs. Beacon Theatres, Inc., a corporation, Defendant", being action No. 20658-HW, hereinafter referred to as said action. A copy of said complaint is attached to petitioner's Petition for Writ of Mandamus as Exhibit "A"

2. On November 8, 1956 Pacific Drive-In Theatres Corporation filed a Notice of Motion to Intervene in said action

as defendant under Rule 24 of the Federal Rules of Civil Procedure, and on December 3, 1956 respondent made an order granting the motion of Pacific Drive-In Theatres Corporation to intervene.

3. On December 29, 1956 defendant in said action filed its Notice of Motion and Motion to dismiss plaintiff's Complaint for Declaratory Relief, a copy of which is attached to petitioner's Petition for Writ of Mandamus as Exhibit "B".

4. On January 17, 1957 after presentation of legal memoranda by the parties in said action, and after hearing [fol. 112] oral argument, respondent made an order denying defendant's motion to dismiss plaintiff's complaint in said action. A copy of said order is attached to petitioner's Petition for Writ of Mandamus as Exhibit "C".

5. On February 14, 1957 defendant in said action filed its Answer, Counter-Claim and Cross-Claim and Demand for Jury Trial, a copy of which is attached to petitioner's Petition for Writ of Mandamus as Exhibit "E-1".

6. On February 21, 1957 plaintiff in said action filed Notice of Motions to strike defendant's demand for a jury trial, to strike from defendant's answer certain defenses and for a separation of the issues raised by plaintiff's complaint from the anti-trust issues and for an early trial upon the issues raised by the complaint, as set forth in plaintiff's Notice of Motion and Motion which is attached hereto and marked Exhibit "I". Legal memoranda on the questions raised by said plaintiff's motion were presented to the Court, the matter was orally argued, and on March 21, 1957 respondent made an order with respect to plaintiff's motion hereinabove referred to in this paragraph, as set forth in Exhibit "G" attached to petitioner's Petition for Writ of Mandamus.

7. On April 1, 1957 respondent made an order setting for trial on July 8, 1957 the issues raised by plaintiff's complaint and the answer of defendant and the answer of [fol. 113] intervening defendant Pacific Drive-In Theatres Corporation without a jury.

8. On April 9, 1957 intervening defendant Pacific Drive-In Theatres Corporation in said action filed its Answer to Cross-Claim of defendant. A copy of said Answer is attached to petitioner's Petition for Writ of Mandamus as Exhibit "D".

9. On April 10, 1957 plaintiff in said action filed its Answer to petitioner's Counter-Claim and Cross-Claim, a copy of which said Answer is attached to petitioner's Petition for Writ of Mandamus as Exhibit "H".

10. On July 1, 1957, respondent made an order vacating said trial date of July 8, 1957.

Petitioner has heretofore lodged its Application for Leave to File Writ of Mandamus with this Honorable Court.

WHEREFORE, it is respectfully submitted that petitioner's Petition for Writ of Mandamus should be denied and the order to show cause herein be vacated for the following reasons:

(1) Under the Seventh amendment to the Constitution the right to trial by jury does not exist with respect to the issues raised by plaintiff's complaint in said action for the reasons:

(a) the allegations of said complaint present a case [fol. 114] cognizable in equity in that plaintiff has alleged that defendant has interfered with plaintiff's right to negotiate for clearance in favor of its theatre over those competitive to it and that plaintiff is without any speedy or adequate remedy at law and that it will be irreparably harmed unless an injunction is issued. Respondent has not, as averred in Paragraphs IX and X of the Petition for Writ of Mandamus herein, denied a jury trial on the issues presented by said complaint for the reason that an action for declaratory relief is per se an action in equity, but for the reason that the complaint contains allegations sounding in equity and prays for equitable relief. Monetary damages are nowhere sought in said complaint;



(b) an action to determine whether two theatres are in competition and whether clearance may be granted was unknown to the common law and has its genesis not in the common law but in part at least in the decree of the court of equity in *United States v. Paramount* (66 Fed. Supp. 323, 342—"The decision of such controversies as may arise over clearances should be left to local suits in the area concerned [fol. 115] \* \* \*").

(2) Respondent has not and does not propose to deny to defendant a jury trial upon the legal issues presented by its Cross-Claim.

(3) In separating the issues in said action and in ordering an early trial of the issues raised by the complaint of plaintiff therein, respondent was performing a judicial act within his jurisdiction and discretionary power and was thereby exercising his said judicial discretion and fully performing his judicial functions and duties in accordance with Rules 57 and 42b of the Federal Rules of Civil Procedure. That it was and is the position of respondent that plaintiff may not be deprived of its prerogative of securing an early judicial declaration of its rights by the Court as presented by its complaint for declaratory judgment by the expedient of a Cross-Claim under the anti-trust laws raising wholly different and divergent issues from those raised by the complaint and answer thereto and upon which Cross-Claim a jury trial is demanded.

(4) Contrary to the averment contained in Paragraph XI of petitioner's Petition for Writ of Mandamus, a determination of the issues raised by the complaint in said action will not serve as an adjudication of the basic issue raised by defendant's Cross-Claim, to wit, that of conspiracy to restrain trade which will remain undecided until [fol. 116] the trial of the issues raised by said Cross-Claim.

(5) Contrary to the averments of lack of jurisdiction contained in Paragraph XII of petitioner's Petition for Writ of Mandamus, it was and is the position of respondent that jurisdiction exists for the reasons:

(a) there is alleged in plaintiff's complaint in said action an actual and threatened interference by defendant with plaintiff's legal right to negotiate equally with defendant for a prior exclusive run;

(b) the right to negotiate for a prior exclusive run exists if there is substantial competition between plaintiff's theatre and defendant's theatre and a finding of the Court on this issue will bear upon the right of either plaintiff or defendant to negotiate for a prior exclusive run and will serve as more than an advisory opinion;

(c) contrary to the averment contained in subparagraph (c) of Paragraph XII of petitioner's Petition for Writ of Mandamus, plaintiff's complaint in said action seeks injunctive relief against defendant together with other specific relief;

(d) contrary to the averment contained in subparagraph (d) of Paragraph XII of petitioner's Petition [fol. 117] for Writ of Mandamus, the controversy as to whether defendant has interfered with plaintiff's alleged legal right to negotiate for a prior exclusive run will be finally settled and determined. The distributors of motion pictures are not indispensable parties and would be improper parties in that neither the Court nor plaintiff could compel any distributor to grant plaintiff an exclusive prior run; however, the Court can determine whether plaintiff has the right to negotiate for a prior exclusive run free of threats and duress allegedly exerted upon said distributors by petitioner;

(e) jurisdiction further exists by reason of the fact that said action arises under the laws of the United States and that further diversity of citizenship and the requisite jurisdictional amount are alleged in said complaint.

The herein named respondent does hereby designate and authorize Frank R. Johnston and Hudson B. Cox and the firm of Newlin, Taekabury & Johnston as counsel to present response of respondent herein named and to file

such briefs and to make such argument as may be appropriate on the order to show cause herein.

[fol. 118] DATED: Los Angeles, California, July 15th, 1957.

/s/ Harry C. Westover, Judge of the United States District Court for the Southern District of California. Respondent.

/s/ Frank R. Johnston.

/s/ Hudson B. Cox.

/s/ Newlin, Tackabury & Johnston, Attorneys for Respondent.

[fol. 119]

EXHIBIT "I"

Law Offices  
NEWLIN, TACKABURY & JOHNSTON  
1100 Roosevelt Building  
Los Angeles 17  
MUTual 7205  
Attorneys for Plaintiff

C  
O  
P  
Y

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

Civil Action No. 20658-HW

FOX WEST COAST THEATRES CORPORATION,  
a corporation, Plaintiff,

v.

BEACON THEATRES, INC., a corporation, Defendant.

NOTICE OF MOTIONS

*To Defendant and Cross-Claimant, Beacon Theatres, Inc.,  
and to Intervenor, Pacific Drive-In Theatres Corp.,  
and to Their Respective Counsel of Record:*

Please Take Notice that plaintiff and cross-defendant, [fol. 120] Fox West Coast Theatres Corporation, on Monday, March 4, 1957, in the court room of the Honorable Harry C. Westover, United States Post Office and Court House, 312 North Spring Street, Los Angeles, California, at 10 o'clock A.M., or as soon thereafter as counsel may be heard, will present to the above entitled Court the motions hereto attached.

NEWLIN, TACKABURY & JOHNSTON

By Frank R. Johnston

By Hudson B. Cox

Attorneys for plaintiff and cross-defendant  
Fox West Coast Theatres Corporation

[fol. 121]

Law Offices

NEWLIN, TACKABURY & JOHNSTON

1100 Roosevelt Building

Los Angeles 17

MUtual 7205

Attorneys for Plaintiff

C  
O  
P  
Y

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

Civil Action No. 20658-HW

FOX WEST COAST THEATRES CORPORATION,  
a corporation, Plaintiff,

v.

BEACON THEATRES, INC., a corporation, Defendant.

**MOTION OF FOX WEST COAST THEATRES CORPORATION TO STRIKE DEFENDANT'S DEMAND FOR JURY TRIAL UPON THE COMPLAINT AND ANSWER FOR DECLARATORY JUDGMENT, TO STRIKE PORTIONS OF DEFENDANT'S ANSWER, FOR A SEPARATION OF ISSUES AND FOR AN EARLY TRIAL.**

Plaintiff and cross-defendant, Fox West Coast Theatres Corporation, herewith respectfully moves the above entitled court as follows:

[fol. 122]

**I.**

To strike defendant's demand for a jury trial upon the complaint and answer for Declaratory Judgment upon the ground that the right to a jury trial upon such issues is not granted by statute and is not preserved by the Constitution of the United States, and upon the further ground that the issues raised by the complaint and answer for Declaratory Judgment are essentially equitable in nature.

**II.**

To strike from defendant's answer the third affirmative defense therein and those portions of paragraph VIII of said answer commencing on page 5, line 8 and continuing through page 9, line 2, upon the grounds that said matter does not constitute a sufficient defense and is immaterial and impertinent to any of the issues raised by the complaint for Declaratory Judgment.

**III.**

For a separation of the Declaratory Judgment issues from the anti-trust issues and for an early trial upon the Declaratory Judgment issues, upon the ground that such a separate trial is both in furtherance of convenience and is necessary to avoid prejudice, and upon the ground that an early trial of an action for a Declaratory Judgment is contemplated by the rules and is necessary to preserve and safeguard the interests of the parties.

The foregoing motions will be based upon the memoranda [fol. 123] of law and affidavits filed concurrently herewith



and hereafter to be filed, and upon all the files and records in the above entitled proceeding.

Respectfully submitted,

NEWLIN, TACKABURY & JOHNSTON

By Frank R. Johnston

By Hudson B. Cox

Attorneys for plaintiff and cross-defendant  
Fox West Coast Theatres Corporation

[fol. 124]

No. 15614.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BEACON THEATRES, INC., a corporation, Petitioner,

v.

THE HONORABLE HARRY C. WESTOVER, Judge of the United States District Court of the Southern District of California, Central Division, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS.

INTRODUCTION AND STATEMENT OF FACTS

We take it as settled in the law and economics of the motion picture industry that the exhibition of a motion picture cannot feasibly be displayed in all theatres at the same time; or stated differently, that it is both economically necessary and entirely legal for a distributor of motion pictures to license its picture for exhibition in one theatre [fol. 125] before it is exhibited in another theatre in the same competitive area.

As stated by this court in *Chorak v. RKO Radio Pictures*, 196 F. 2d 225, 228:

"As pointed out in *Fanchon & Marco v. Paramount Pictures, Inc.*, supra, 100 F. Supp. at page 90 an ex-

hibitor does not have the right to *compel* a motion picture producer to give him a preferred run—this because as a very practical matter the motion picture industry could not operate under a system of simultaneous releases. This obvious fact underlies the doctrine that clearances and runs are not illegal *per se*."

And as the Respondent Judge observed in *Paramount Pictures Theatres Corp. v. Partmar Corp.*, 97 Fed. Supp. 552 at 558 (affirmed on opinion of court below, 200 Fed. 2d 561; affirmed 349 U.S. 89; 98 L. Ed 532; 74 S. Ct. 414):

"It is admitted by all the expert witnesses (both plaintiff's and defendant's) who testified in this case that runs and clearances are necessary in the motion picture industry. As heretofore mentioned, it is impossible to allow all theatres to show the same picture at the same time; hence some preference must be given to certain theatres. Runs and clearances have been used for many years, and even those permitted only second or third run rights are nevertheless of [fol. 126] the opinion that runs are necessary and that there should be clearances between runs. In other words, after a theatre finishes a picture there should be a lapse of some days before the same film should be shown in another picture in the same neighborhood.

\* \* \* \* \*

"Where there is a restricted community, whether rural or urban, in which there is more than one theatre, one theatre certainly must be given preference over the others. Neither the theatre owner, producer, nor distributor would want their pictures shown simultaneously in two theatres adjacent to or across the street from each other. The theatre owners themselves wish to have the right to show a picture first within a given community. As a result the distributor must determine which theatre is to have prior right."

The decrees entered in *United States v. Paramount Pictures, Inc., et al.* (D.C.N.Y.S.D.) Equity No. 87-273 (decisions at 66 F. Supp. 323, 85 F. Supp. 881 and 334 U.S. 131,

92 L. Ed. 1260) enjoined the major distributors of motion pictures "from granting any clearance between theatres not in substantial competition" (Complaint for Declaratory Relief, Pet'n p. 20).

In this posture of the law and prior to the opening of its new Belair Drive-in Theatre in the vicinity of the city of San Bernardino, the Petitioner Beacon Theatres, Inc., [fol. 127] according to the allegations of the Complaint, claimed an absolute right to license pictures for exhibition at its Drive-In Theatre simultaneously with their first-run exhibition in Downtown San Bernardino where the plaintiff, Fox West Coast, owned and operated a first-run theatre, the California Theatre.<sup>1</sup> It coupled these demands for a simultaneous, or so-called "day and date" run with threats that unless it got what it wanted it would sue Fox West Coast and any recalcitrant distributors for treble damages under the anti-trust laws (Complaint para. XII Pet'n P. 23):

Faced with these threats to its pre-existing business relations with the distributors of motion pictures in San Bernardino and deeming that a simultaneous exhibition of pictures at Petitioner's Drive-In and at its California Theatre would materially and adversely affect the business at both theatres, and contending that Petitioner should compete openly and fairly with other exhibitors for the first run exhibition of pictures in the area, Fox West Coast sought judicial relief. In so doing it was following [fol. 128] the suggestion approved by this Court in *Chorak v. RKO Radio Pictures, supra*, where the court said at p. 229 of 196 Fed. 2d:

"In the Paramount case, D.C., 66 F. Supp. 323, 342, and in *Dipson Theatres, Inc., v. Buffalo Theatres, Inc.*, 2 Cir., 190 F. 2d 951, 958, approval is given the doctrine that 'the decision of such controversies as may arise over clearances should be left to local suits in the area concerned.'"

<sup>1</sup> The demands of the Petitioner in this regard were substantially identical with the contentions of the plaintiff, which the Supreme Court disapproved, in *Theatre Enterprises v. Paramount Distributing Corp.*, 346 U.S. 537, 98 L. Ed. 273.

The Complaint for Declaratory Relief (Pet'n pp. 15-25), which of course speaks for itself, nowhere, as the Petitioner represents, sought to perpetuate the California Theatre in its first run position or to relegate the Belair Drive-In to a subsequent run. On the contrary, the complaint (Para. XI Pet'n p. 23) affirmatively alleges:

"Plaintiff further contends that it has an *equal* right with the defendant to negotiate with each Distributor independently for a prior run for plaintiff's California Theatre ahead of any other theatre, including defendant's Bel-Air Drive-in Theatre, in said competitive area and that there is no obligation on the part of any Distributor in such a case to grant an equal and simultaneous run to defendant's said Bel-Air Drive-in Theatre."

Similarly the prayer of the complaint prays (Pet'n p. 25):

"2. That it be decreed that the Distributors are and [fol. 129] each of them is entitled to negotiate with plaintiff and defendant and with other owners and operators of theatres in said competitive area equally for a prior run in said competitive area."

It is the plaintiff, Fox West Coast, which urges and seeks the right to compete with Petitioner, Beacon Theatres, for a prior run in the area and it is the Petitioner who is so assiduously striving to avoid competition, a fact which attains significance when we come later to consider the anti-trust Cross-claim.

Because of the harmful impact of a simultaneous exhibition of pictures at the defendant's competitive theatre, Fox West Coast sought a judicial declaration as to the existence or non-existence of substantial competition between the theatres and an injunction *pendente lite* against the continuing threats of anti-trust litigation if the distributors did not accede to the defendant's demands. It proceeded by way of the Declaratory Judgment Act, 28 U.S.C. secs. 2201 and 2202 to secure a judicial resolution of the diverse contentions of the plaintiff and the defendant and sought an early trial. Rule 57 of the Federal Rules of Civil Procedure provides that: "The court may order

a speedy hearing of an action for declaratory judgment and may advance it on the calendar".

From that point on the record makes it abundantly clear that the last thing the Petitioner, Beacon Theatres, [fol. 130] wanted was a judicial declaration of the correlative rights of the parties to negotiate for the licensing of pictures ahead of and with clearance over the other theatre.

First there was a motion attacking the jurisdiction of the court and the adequacy of the complaint (Ex. B Pet'n p. 26). This was denied.

Then there was an answer, not squarely meeting the issues of the complaint (although Beacon Theatres did admit that it contended that there was no substantial competition between the Belair and the California Theatres (Para. VII Pet'n p. 38); but interposing affirmative and irrelevant allegations of conspiracy in restraint of trade and attempt at monopolization on the part of plaintiff and other exhibitors in the San Bernardino area together with six major distributors of motion pictures and a cross-claim seeking \$300,000 damages for the same alleged anti-trust violations. A trial by jury was demanded.

The strategy was apparent and barefaced; to confuse the simple issue raised by the complaint with charges of past and present malefactions under the anti-trust laws; to delay the trial by the time necessary to prepare to defend charges of monopolization, attempted monopoly and conspiracy in restraint of trade; to profit before a jury from the fact that plaintiff itself would have to introduce into evidence parts of the decrees in *United States v. [fol. 131] Paramount Pictures Inc.* notwithstanding the inadmissability (sic) under Section 5 of the Clayton Act (15 U.S.C.A. Sec. 16) of the Paramount decrees on defendant's cross-claim;<sup>2</sup> and finally to confound and confuse

<sup>2</sup> Where a theatre commences to do business after the effective date of the *Paramount* findings they are inadmissible as prima facie evidence:

*Paramount Film Distributing Corp. v. Village Theatre*, (C.A. 10) 228 Fed. 2d 721, 727.

*Steiner v. Twentieth Century-Fox Film Corp.*, (C.A. 9) 232 Fed. 2d 190, 196.

*Hillside Amusement Co. v. Warner Bros.* (C.A. 2) 224 Fed. 2d 629, 630.



a lay jury called upon to decide a simple issue as to existence or non-existence of substantial competition between theatres in a trading area with charges, easy to make but hard to defend, of improper and illegal practices in the licensing and distribution of motion pictures.<sup>3</sup>

The plaintiff sought the only remedy available to it: it moved the Respondent Judge to exercise his discretionary [fol. 132] powers under FRCP Rule 42(b) to separate the issues raised by the complaint and answer for declaratory judgment from the anti-trust issues raised by the cross-claim, permitting the Petitioner to have its jury trial on the cross-claim, and to set for an early trial by the court the conflicting contentions of the parties on the question of substantial competition between the theatres involved.

The defendant's strategy is not new to the courts and it has generally met with the same treatment it received here.

In *Smith, Kline & French Labs. v. International Pharmaceutical Labs.* (D.C. N.Y.) 98 Fed. Supp. 899, plaintiff brought action to enjoin the defendants from unfair competitive conduct. The defendants counterclaimed, charging the plaintiff with violating the anti-trust laws. Plaintiff moved for a separate trial upon its complaint and the answer thereto and to have it stricken from the jury calendar. In granting the motion for the separate trial Judge Byers stated, page 901:

"However, it is possible to gather that the defendants, by way of avoidance, wish to establish the unworthy nature of the plaintiff's conduct and activities according to the defendants' notions, and the courts are open to them for that purpose. It seems to be recognized that such issues are for a jury, as lately declared in *Ring v. Spina*, 2 Cir., 166 F. 2d 546, but it [fol. 133] does not follow that the defendants can thus compel the plaintiff to forego having a court decide the cause which it has proffered. Since the demand for a jury trial seems not to be in terms restricted to

<sup>3</sup> The complications of which have been considered by this court not only in the *Chorak*, *Fanchon and Marco* and *Partmar* cases, *supra*, but also in *Steiner v. Twentieth Century-Fox Film Corp.*, 232 Fed. 2d 190.

specific issues, the court may direct the procedural traffic so as to accomplish the orderly and reasonably prompt progress of the cause.

"The cause is to be listed also on the non-jury calendar, to be tried by the court as provided in Rule 38 (b) prior to the trial of the issues presented in the counterclaim."

Again, in *Society of European Stage Authors and Composers v. WCAU Broadcasting Co.*, (D.C. Pa.) 35 F. Supp. 460,—a suit for infringement of copyright where defendant counterclaimed under the anti-trust laws—Judge Bard in granting a separate trial stated, page 461:

"It is no defense to a suit for infringement of copyright on musical compositions that the plaintiff is a combination in restraint of trade. Abundant authority settles this. *Buck et al. v. Newsreel, Inc., et al.*, D.C., 25 F. Supp. 787, and cases therein cited; *Buck et al. v. Spanish Gables, Inc., et al.*, D.C. 26 F. Supp. 36. Therefore, the question of unlawful combination will [fol. 134] not be concerned in the determination of the rights of the litigants as presented by the complaint and answer. That is a question to be considered solely under the cross-claim.

As to whether there shall be separate trials and separate judgments rests in the sound discretion of the trial judge, and the determining factors are the doing of justice, the avoidance of prejudice, and the furtherance of convenience. *Seagram Distillers Corporation v. Manos*, D.C., 25 F. Supp. 233. There being nothing to compel a joint trial of the separate issues, I am constrained, by reason, to agree with the plaintiff that the convenience and fairness of separate trials warrant separation."

Finally faced with a trial date in July, 1957, on the Declaratory Judgment issues, defendant after delaying until June pursued the truly extraordinary tactic of seeking what is tantamount to an appellate review by this court of

every interlocutory adverse order made by the Respondent; it petitioned for a Writ of Mandamus to have this court, before trial and before final judgment, review not only the denial of a jury on the Declaratory Judgment issues, but whether the Respondent abused his discretion in ordering separate trials and whether the complaint stated a claim under the Declaratory Judgment Act.

[fol. 135] The Petition for the Writ should be forthwith denied.

# I.

Where the Right to a Trial by Jury Is to Be Determined From a Construction of the Pleadings, i.e. Whether the Action Is at Law or in Equity, Mandamus Is Not a Proper Remedy to Review the Decision of the Trial Judge.

We take no issue with Petitioner that in an appropriate case a party is entitled as of right to a jury trial in a Declaratory Judgment action.

The right to a jury trial in such an action is determined by whether the action sounds essentially in equity or at law. Professor Moore states it thus:

"The basic nature of the issue determines the right of jury trial when demanded. Thus if the action is properly one for the cancellation of an instrument and hence equitable, no right of jury trial is gained by asserting that the action 'is really in the nature of a declaratory judgment'. And where the complaint is framed along equitable lines looking to injunctive relief, both prohibitory and mandatory, as well as an accounting, together with declaratory relief, the issues raised by the complaint are equitable." (5 Moore's [fol. 136] Federal Practice 2d Ed., p. 213)

In *State Farm Mut. Auto Ins. Co. v. Mossey*, (C.A. 7) 195 Fed. 2d 56, cert. den. 344 U. S. 869, the plaintiff brought a declaratory judgment action against its insured and one who had been injured by the insured automobile to have the policy declared void for misrepresentation of a material fact. The injured defendant demanded a jury trial which

was denied. In affirming, the Seventh Circuit points out that the nature of the action determines the right to a jury and observes that this was not the typical juxtaposition of the parties' case because the plaintiff insurance company had no adequate remedy at law. The court said, p. 59:

"Even so, it yet remains for the court to say whether the action is legal or equitable. To be entitled to a trial by the court, a litigant must present a claim which is equitable in nature. Borchard, *Declaratory Judgments*, 2nd Ed. p. 241. If the issues are not truly equitable, the case must be submitted to a jury; otherwise they must be determined by the judge. *Liberty Oil Co. v. Condon National Bank*, 260 U.S. 235, 43 S. Ct. 118, 67 L. Ed. 232.

"In considering whether an action is equitable or legal, the court may consider the nature of the prayer [fol. 137] for relief. And whether a claim is truly equitable in nature depends upon whether the party asserting the claim would have been entitled to bring a suit in equity on the same claim, which he could not do if he had an adequate remedy at law. Compare *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 383, 55 S. Ct. 310, 79 L. Ed. 440. We have already concluded that appellee did not have an adequate remedy at law and since appellee could have brought an action in equity for the cancellation of the policy in question, it cannot be said that the court erred in denying appellant's motion for a jury trial."

In the recently decided (April 26, 1957) case of *Schaefer v. Gunzburg*, 24 Fed. Rules Serv. 38 a, 2, Case 1 (not yet reported) this court, speaking through Judge Fee, with Judge Stephens and Judge Barnes concurring, affirmed the denial of a jury trial employing the same criteria employed by the Respondent Judge when he determined that the instant complaint for declaratory relief sounded in equity rather than at law.



Before proceeding with an analysis of the complaint to demonstrate its strictly equitable nature, we pause to observe that mandamus is not an available remedy to [fol. 138] secure an intermediate review of the trial court's construction of the pleadings and its conclusion therefrom that the complaint at bar sounded in equity rather than at law.

The All Writs Act, 28 U.S.C.A. §1651, provides "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

It is difficult to comprehend in what manner the issuance of a writ now would aid the jurisdiction of this court on appeal where, if the Respondent Judge was in error in denying a jury trial, that fact may be reviewed on appeal from final judgment, as was done in fact in *Pacific Indemnity v. McDonald* (C.A. 9) 107 Fed. 2d 446 and in *Dickenson v. General Accident etc. Co.* (C.A. 9) 147 Fed. 2d 396, the cases on which Petitioner so strongly relies (Pet'n pp. 88-93).<sup>4</sup>

[fol. 139] However, we address ourselves not to the power of this court to issue a Writ of Mandamus where a jury trial has been denied clearly in contravention of the Seventh Amendment but rather to the impropriety of issuing this extraordinary writ based solely upon a substitution of this court's interpretation of the pleadings for that of the trial court.<sup>5</sup>

The reluctance of the courts to utilize Writs of Mandamus to control the trial court in its conduct of litigation is illustrated in such cases as *La Buy v. Howes Leather Co.*,

<sup>4</sup> Judge Magruder of the First Circuit concludes that the issuance of mandamus to reverse a denial of a jury trial in no wise "aids" the jurisdiction of the court of appeal and is an improper use of the All-Writs section of the Judicial Code. *In re Chappell & Co.*, 201 Fed. 2d 343, 346; *In re Previn*, 204 Fed. 2d 417, 418.

<sup>5</sup> As Judge Fee observed in the recently decided (June 2, 1957) *Institutional Drug Distributors, Inc. v. Hon. Leon Yankwich*, Misc. No. 637 on an application for leave to file a petition for writ of mandamus, "It would be improper for this Court, at this stage of the litigation, to pass upon the complaint or the counterclaim."



352 U.S. 249, 1 L. Ed. 2d 290, where, because of improper reference of an anti-trust case to a master, the Supreme Court found there was "an abdication of the judicial function depriving the parties of a trial before the court". Under such circumstances the court, divided five to four, affirmed the issuance of a Writ of Mandamus by the Seventh Circuit, not without saying, however, p. 298 of 1. L. Ed. 2d:

[fol. 140] "It is true that mandamus should be resorted to only in extreme cases since it places trial judges in the anomalous position of being litigants without counsel other than uncompensated volunteers."

In the preceding term in *Parr v. United States*, 351 U.S. 513, 100 L. Ed. 1377, the Supreme Court stated the bounds for the issuance of extraordinary writs to review interlocutory orders, p. 520 of 351 U.S.:

"Such writs may go only in aid of appellate jurisdiction. 28 USC §1651. The power to issue them is discretionary and it is sparingly exercised. Rule 30 of the Revised Rules of this Court and the cases cited therein. This is not a case where a court has exceeded or refused to exercise its jurisdiction, see *Roche v. Evaporated Milk Asso.* 319 US 21, 26, 89 L. ed 1185, 1190, 63 S Ct 938, nor one where appellate review will be defeated if a writ does not issue, cf. *Maryland v. Soper*, 270 US 9, 29, 30 70 L ed 449, 456, 457, 46 S Ct 185. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. *Roche v. Evaporated Milk Asso.*, supra (319 US at p 30)."

[fol. 141] *Bankers Life and Casualty Co. v. Holland*, 346 U. S. 379, 98 L. Ed. 106, clearly demonstrates the impropriety of reviewing on petition for a writ discretionary action taken by a trial judge. That was an action for treble damages under the anti-trust laws brought in the Southern District of Florida naming as defendants, in

addition to residents of that district, the insurance commissioner of Georgia, who was personally served in Florida. The trial court after holding that it had jurisdiction of the action and of the commissioner held that venue was not properly laid as to the Commissioner and ordered the action as to him severed and transferred to the Northern District of Georgia. Petitioner then sought a writ of mandamus from the Court of Appeals to compel the vacation of the order of severance and transfer. The Supreme Court affirmed the denial of the writ, saying, p. 382 of 346 U.S.:

"The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 USC §1651(a). As was pointed out in *Roche v. Evaporated Milk Assn.* 319 US 21, 26, 87 L ed 1185, 1190; 63 S Ct 938 (1943), the 'traditional use' of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it [fol. 142] to exercise its authority when it is its duty to do so.' Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. \* \* \* Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power; *Roche v. Evaporated Milk Assn.* (US) *supra*, and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly cir-

cumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by [fol. 143] Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in *De Beers Consol. Mines v. United States*, 325 US 212, 217, 89 L ed 1566, 1572, 65 S Ct 1130 (1945). This is not such a case.

It is urged, however, that the use of the writ of mandamus is appropriate here to prevent 'judicial inconvenience and hardship' occasioned by appeal being delayed until after final judgment. But it is established that the extraordinary writs cannot be used as substitutes for appeals, *Ex parte Fahey*, 332 US 258, 260, 91 L ed 2041-2043, 67 S Ct 1558 (1940), even though hardship may result from delay and perhaps unnecessary trial, *United States Alkali Export Assn. v. United States*, 325 US 196, 202, 203, 89 L ed 1554, 1560, 1561, 65 S Ct 1120 (1945); *Roche v. Evaporated Milk Assn.*, supra, (319 US at 31); and whatever may be done without the writ may not be done with it. *Ex parte Rowland*, 104 US 604, 617, 26 L ed 861, 866 (1882). *We may assume that, as petitioner contends, the order of transfer defeats the objective of trying related issues in a single action and will give rise to a myriad of legal and practical problems as well as inconvenience to both courts; but Congress must have contemplated [fol. 144] those conditions in providing that only final judgments are reviewable. Petitioner has alleged no special circumstances such as were present in the cases which it cites. Furthermore, whatever 'judicial inconvenience and hardship' may exist here will remain, after transfer, within the realm of the same court of appeals which has denied the writ, since both of the districts are within that circuit; and it is not clear that adequate remedy cannot be afforded petitioner in due course by that court to prevent some of the conflicts and procedural problems anticipated.*

"We adhere to the language of this Court in *Ex parte Fahey*, supra (332 US at 259, 260):

"Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. . . . As extraordinary remedies, they are reserved for really extraordinary causes."

We urge, therefore, that where the right to a jury trial [fol. 145] is as groundless as in the case at bar, depending as it does upon the construction to be placed on the pleadings, there is actually an absence of power in this court to issue the writ. At the very least, in the light of the admonitions of the Supreme Court, it would be an improper exercise of the power vested in this court by the All Writs Act for it to be utilized on an interlocutory appeal to review the trial court's construction of the pleadings. Again, quoting from page 6 of the Slip Opinion in *Institutional Drug Distributors v. Yankwich*, this court cogently observed:

"In case of appeal from the final judgment, this Court may be required to determine whether that discretion has been abused, if the complete record shows on appeal that a constitutional right of jury trial has been denied. \* \* \* This Court should not interdict a trial unless it is demonstrated that a right of petitioner has been infringed. We are bound to assume that the trial court is proceeding properly. There has been no showing to this Court that, if it be assumed Institutional had a right, appeal from the final judgment or some other course would be a clearly inadequate remedy.

As it is, we are haunted by the specter of multiple appeals to this Court. That is indeed an evil. To avoid such appeals in this and other cases, no action [fol. 146] should be now taken."



*The Complaint for Declaratory Judgment and Answer  
thereto pose only equitable issues and issues not  
within the Seventh Amendment*

The petition partially summarizes the complaint (Pet'n pp. 4-7) and sets it forth in full as Exhibit A (Pet'n pp. 15-25); hence we will not burden the court with a further paraphrase of the complaint other than to observe that it is closely akin to the traditional bill in chancery, *Quia Timet*. It alleges in essence that plaintiff's pre-existing contractual relationships with the distributors of motion pictures is being wrongfully interfered with by the defendant and that the latter is exerting duress and coercion upon plaintiff and the distributors by its threats of anti-trust litigation if the distributors license plaintiff's theatre a run ahead of the newly constructed Belair Drive-In Theatre. It alleges that plaintiff is without any speedy or adequate remedy at law and will be irreparably harmed unless defendant, its officers, agents and employees, are restrained and enjoined<sup>6</sup> from instituting any action under the anti-trust laws against [fol. 147] plaintiff and the distributors, or any of them, based upon the facts alleged during the pendency of the action and until such time as the court should determine whether or not the plaintiff and defendant have an equal and correlative right to license a prior run with clearance on behalf of their respective theatres. It seeks no money damages. The Respondent Judge concluded that the issues raised by the complaint and answer were essentially equitable rather than "a suit at common law" (Seventh Amendment). The correctness of his conclusion seems indisputable.

In *California Grape Control Board v. California Produce Corp.*, 4 Cal. App. 2d 242, wherein plaintiff sought to enjoin a competitor from interfering with its business relations with others, the court said, in affirming the issuance of an injunction, p. 244:

<sup>6</sup> The relief prayed for falls within the equity powers of the court as adverted to in *Institutional Drug Distributors*, page 6 of the Slip Opinion, "Equity had power to enjoin a trial even in a separate tribunal of common law, under certain circumstances, until the issues cognizable in chancery had first been determined."

See also Restatement "Torts" §766 and Comment n. p. 62.



"Here the respondent bases its action on the simple principle that its right to carry on its business without obstruction under the contract pleaded is a property right with which the appellants threaten to illegally interfere. In its demand for injunctive relief the respondent pleaded, and the trial court found, that the acts complained of would result in irreparable damage for which the respondent had no adequate remedy at law.

Under such circumstances the great weight of authority [fol. 148] compels an affirmance of the judgment; the rule applicable being well stated in *Beekman v. Marsters*, 195 Mass. 205 (80 N.E. 817, 821, 122 Am. St. Rep. 23, 11 Ann. Cas. 332, 11 L.R.A. (N.S.) 201), as follows: 'Where the plaintiff proves that the defendant unlawfully interferes or threatens to interfere with his business or his rights under a contract, and further makes out in proof that damages will not afford an adequate remedy, equity will issue an injunction.' See, also, 32 Cor. Jur., p. 155 and p. 228; 14 R.C.L., p. 390; 15 R.C.L., p. 64; *Alcazar Am. Co. v. Mudd & Colley Am. Co.*, 204 Ala. 509 (86 So. 209); *Northern Wis. C. T. P. v. Bekkedal*, 182 Wis. 571 (107 N.W. 936); *Fort v. Co-op. Farmers' Exchange*, 81 Colo. 431 (256 Pac. 319); *Phez Co. v. Salem Fruit Union*, 103 Or. 514 (201 Pac. 222; 205 Pac. 970, 25 A.L.R. 1090)."

The propriety of equitable relief against a defendant wrongfully inducing a third party not to enter into a business relationship with plaintiff is illustrated in *Bautista v. Jones*, 25 Cal. 2d 746.

#### *This is not a "Juxtaposition of parties" case*

It is of course, thoroughly well settled, particularly in insurance cases, that a litigant may not "by reversing the normal procedure deprive his adversary of the right which would otherwise be his to have his case determined by a [fol. 149] jury".<sup>7</sup> This doctrine of juxtaposition of parties,

<sup>7</sup> *Dickenson et al. v. General Accident etc. Corp.* (C.A. 9) 147 Fed. 2d 396. Also *Pacific Indemnity v. McDonald*, (C.A. 9) 107 Fed. 2d 446.

however, has as its essence the loss to the defendant of its right to a jury determination on a subsequent action on the policy against the insurer. The complete inapplicability of the doctrine to the case at bar is immediately apparent from the fact that petitioner has expressly reserved to it the right to a jury trial when the issues raised by its cross-claim and the answers thereto shall come to trial. The Response of the respondent expressly so states (Response, Para. (2) p. 6).

This distinction is forcibly demonstrated in the decision of this court in *Institutional Drug Distributors, Inc. v. Honorable Leon Yankwich*, and particularly by the dissent of Judge Barnes. In that case an Application for leave to file a Petition for Writ of Mandamus was denied where it appeared that plaintiff Searle & Co. had brought an action against Institutional for infringement of trade-mark and unfair competition. The defendant answered with a general denial and a separate defense that Searle had used the alleged trade-mark in violation of the anti-trust laws and by reason thereof was in court with unclean hands. Institutional [fol. 150] also filed a counterclaim for \$300,000 damages and for an injunction for alleged violations by plaintiff and other third party defendants of the anti-trust laws. A jury trial was demanded on the counterclaim.

The trial judge separated the issues and directed trial of the complaint and answer, "including the defense of 'unclean hands' by reason of claimed violations by Searle of the anti-trust laws", by the court without a jury before any trial by jury of the issues raised by the counterclaim.

The similarity to the case at bar is apparent but for one most significant distinction. In the *Institutional* case the trial court proposed to hear and try the affirmative defense of unclean hands by reason of plaintiff's alleged anti-trust violations. In the case at bar, Judge Westover has stricken from the answer the affirmative allegations and affirmative defense of anti-trust violations and preserved them for jury trial as part of the cross-claim. (Pet'n. p. 65—see Para. 2.)

The objection voiced in Judge Barnes' dissent in *Institutional Drug Distributors*, that by the retention of the affirmative defense the defendant in that case might well

find itself with all the issues of its counterclaim decided adversely to it by the court and its right to a jury trial on these issues foreclosed, is completely answered in the case at bar by the fact that all the anti-trust issues are expressly reserved for later trial to a jury, having been stricken from [fol. 151] the declaratory relief issues to be tried by the court.

*The determination of the existence or non-existence of competition between the theatres has no bearing upon the anti-trust issues of the cross-claim.*

It is ridiculous upon its face for the Petitioner to assert that the trial judge's determination of the existence or non-existence of substantial competition for the same potential theatre patronage between the Belair Drive-In Theatre and plaintiff's California Theatre and other theatres in the San Bernardino trading area will be determinative in any sense of the issues raised by the cross-claim for damages for alleged anti-trust violations.

The Petitioner, as cross-claimant, charges the plaintiff, the intervenor, Pacific Drive-In Theatres Corp., and other exhibitors and distributors of motion pictures in the San Bernardino area with being parties to a conspiracy in restraint of trade and a conspiracy to monopolize and to attempt to monopolize trade by agreeing:

(1) To fix a system of runs and clearances in the San Bernardino area in favor of the theatres of Fox West Coast, Pacific Drive-In Theatres and Stanley Warner Corporation, designed to confer a monopoly of first-run exhibition upon their theatres.

[fol. 152] (2) To allocate first-run exhibition of feature motion pictures among the theatres of these three named exhibitors.

(3) That the three named exhibitors would refrain from competing with each other for first-run pictures in San Bernardino.

(4) To impose clearance in favor of theatres of these exhibitors against independent exhibitors, including cross-claimant's Belair Theatre.

(5) To discriminate against independent theatres in San Bernardino in the grant of run, clearance and rental terms in the licensing of first-run motion pictures.

(6) That the foregoing acts pursuant to the alleged conspiracy had the purpose and effect of establishing and maintaining a monopoly of first-run exhibition in San Bernardino in theatres of the named exhibitors. (Pet'n pp. 50-52.)

Manifestly, if the cross-defendants and their alleged co-conspirators engaged in the practices of which Petitioner charges them in its cross-claim, the existence or non-existence of substantial competition between the theatres involved in the San Bernardino area would be totally irrelevant. If there was in fact an agreement or conspiracy between the persons charged to monopolize first-run exhibition in the San Bernardino area or a conspiracy in restraint [fol. 153] of trade to discriminate against independent exhibitors, the fact that there might be competition between the theatres of the persons charged with these infractions of the law and Petitioner's Belair Drive-In Theatre would certainly be no defense. The most that the existence of substantial competition determines is that within the proscriptions of the injunctive decrees in *United States v. Paramount*, both the plaintiff Fox West Coast, the intervenor Pacific Drive-In Theatres Corp., and the defendant Beacon Theatres Corp. would each be free to negotiate competitively with the major distributors of motion pictures for an exclusive run in the area, with clearance over competitive theatres subsequently licensing the picture, without doing violence to the injunctive provisions of the *Paramount* decrees.

To illustrate the point: We venture that if the Respondent Judge should find in favor of the existence of substantial competition between the theatres involved, the Petitioner would no more dismiss its cross-claim for \$300,000 damages under the anti-trust laws than the plaintiff and the intervenor would stipulate to judgment against them on the cross-claim in the event that the trial judge finds an

absence of substantial competition between the theatres involved.

*Bruckman v. Hollzer* (C.A. 9) 152 Fed. 2d 730, upon which petitioner relies is not even closely in point. In that case [fol. 154] the complaint alleged three counts: the first, a claim for damages for copyright infringement; the second, an accounting for profits for appropriation of copyright; the third, injunction against continued infringement of copyright.

All three claims involved a common question of fact, i.e. whether there was infringement. All parties were agreed that the first claim, if tried separately, would be a legal claim upon which there was a right to jury, and that the two remaining claims were equitable.

The two questions involved in the case were (1) whether combining the legal claim with the equitable claims deprived plaintiff of a right to jury trial on the legal claim, and (2) since there was a common question of fact, i.e. infringement, upon which all three claims rested, whether the legal claim of the equitable claims should be tried first.

The court held that a joinder of a legal claim for damages with equitable claims did not deprive the plaintiff of a right to jury trial of his legal claim.

The Petitioner and cross-claimant has preserved to it intact the right to a jury trial upon the issues raised by its cross-claim and the answers thereto and whether or not there is substantial competition for the same potential theatre patronage between the theatres involved is determinative of none of those issues.

[fol. 155] *Neither the Seventh Amendment to the Constitution nor the Declaratory Judgment Act gives a right to a jury trial in the case at bar.*

This action for declaratory relief arises out of one of the injunctive provisions in the decrees in *U.S. v. Paramount*. A declaration as to whether certain theatres are or are not in substantial competition within the meaning of these decrees is a proceeding manifestly unknown to the common law.

Rule 38 (a) states "the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given



by a statute of the United States shall be preserved to the parties inviolate". The rule does not enlarge upon the right to a jury trial given by the Seventh Amendment,\* and the [fol. 156] Declaratory Judgment Act (28 U.S.C., Section 2201) does not affirmatively grant the right to a jury trial.

The Seventh Amendment provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved \* \* \*". As Professor Moore says (5 Moore's Federal Practice, Second Edition, page 79):

"By its terms the Seventh Amendment applies only to 'Suits at common law, where the value in controversy shall exceed twenty dollars'. Since there was great diversity among the states concerning the right to jury trial and this led to an omission of any guarantee of jury trial in civil actions in the original Constitution, the common law alluded to in the Amendment is the common law of England as of the time (1791) the Amendment was adopted. This principle does not, however, preclude the application of the Seventh Amendment to newly created rights of a legal nature, which would under common law principles be enforced in a suit at common law. Since the Amendment deals only with suits at common law, it has no application to suits in equity or admiralty, or to administrative proceedings."

An action to declare whether there exists substantial competition between two theatres within the circumscriptions of a prior equity decree (*U.S. v. Paramount Pictures, Inc., et al.*) and to enjoin defendant from continuing threats of litigation for alleged violation of the anti-trust laws, is certainly not a "suit at common law", and de-

\* *Arnstein v. Twentieth Century-Fox Film Corp.* (D.C.N.Y.) 3 F.R.D. 58, states (page 59):

"Rule 38 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, prescribes the steps to be taken for assuring enjoyment of the right to a jury trial, if such right exist; but that rule did not create the right. The source of the right is the law (constitutional and statutory) as it stood preceding the adoption of the rules."

defendant's demand for a jury upon the issues raised by the complaint and answer thereto is improper and beyond the power of the trial court to grant other than in an advisory capacity.

Comparable is the statement of Mr. Chief Justice Hughes in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. page 1, 81 L. Ed. 893, to a contention that the finding of unfair labor practices by the National Labor Relations Board and order of reinstatement with back wages violated the defendant's right to jury trial (page 918 of 81 L. Ed., page 48 of 301 U.S.):

"The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

[fol. 158]

## II.

### The Trial Court Clearly Had Jurisdiction Over the Controversy Between the Parties

In Point IV of Petitioner's Points and Authorities fear is expressed that by entertaining jurisdiction over the controversy in the case at bar, the federal courts may be opening their doors to the resolution of disputes between exhibitors and between exhibitors and distributors over problems of runs and clearance. This, however, is exactly the procedure suggested by the Expediting Court in *United States v. Paramount Pictures, Inc.*, 66 Fed. Supp. 323, 342, when it stated that "the decision of such controversies as may arise over clearances should be left to local suits in the area concerned".

\* The local adjudication of such disputes is further compelled by the fact that the *Paramount* decrees closed the door of that court to all persons other than the specific defendants before the Expediting Court in the *Paramount* case. The *Paramount* decrees each contain the provision:

Petitioner appears to be of the view that the only means by which the presence or absence of competition between theatres and the propriety of clearance of one over the other can be determined is through the expensive and hazardous expedient of a treble damage anti-trust action. We refuse to concede that the jurisdictional powers of the court are thus so closely circumscribed.

Virtually from the inception of Courts of Chancery the doctrine has been accepted that equity does not wait upon precedent but adapts itself to novel situations. Paragraph 30 C.J.S. "Equity", Section 12, page 331:

"The absence of precedents, or novelty in incident, presents no obstacle to the exercise of the jurisdiction of a court of equity, and to the award of relief in a proper case. It is the distinguishing feature of equity jurisdiction that it will apply settled rules to unusual conditions and mold its decrees so as to do equity between the parties; \* \* \*"

That declaratory and equitable relief is a proper means for adjudicating the controversy between the parties in the present case is clear, from at least two cases closely in point:

In *Southside Theatres, Inc. v. United West Coast Theatres Corporation*, C. A. 9, 178 Fed. 2d 648, the plaintiffs, [fol. 160] United West Coast Theatres Corporation and Fox West Coast Agency Corporation, asked for declaratory relief under Section 2201 of Title 28 U.S.C.A. respecting the validity within the purview of the decision in *United States v. Paramount Pictures, Inc.* of a joint venture or joint theatre operating agreement entered into between the parties. In that case, the plaintiff alleged that an actual controversy between the parties existed by reason of the terms of the decree in *United States v. Paramount*, pursuant to which plaintiffs were no longer legally permitted to perform the venture agreement, whereas the defendants contended that

"jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment, and no others to apply to the court at any time for such orders or directions as may be necessary."

regardless of the decree the plaintiffs were still bound by the joint venture agreement and required to perform in accordance with its terms. There was no diversity of citizenship in that case, as there is in the case at bar, and the question before the court was whether a federal question was presented. In affirming the jurisdiction of the District Court, this Court stated, page 651:

"It is alleged that plaintiffs and defendants, competitors in the theatre business, entered into a contract for the joint operation of their rival theatres under an arrangement whereby the profits were to be shared but both properties were to be under the direction and control of the plaintiffs, and that other similar pooling arrangements had been held to constitute violations of [fol. 161] the Sherman Act. Although not well pleaded, and lacking the emphasis given by the pleader to the termination agreement and the findings and decree of the New York District Court, such factual allegations, we think, sufficiently show a substantial controversy with reference to the validity of the joint venture agreement under the Sherman Act, in the posture of the instant case. An action in which the court is asked to declare a contract illegal under the Sherman Act and that the defendants are engaged in unlawful restraint of trade presents a federal question sufficient to give a district court jurisdiction. *Rambusch Decorating Co., v. Brotherhood, etc. of America*, 2 Cir., 105 F. 2d 134, 136; certiorari denied 308 U.S. 587, 60 S. Ct. 110, 84 L. Ed. 492. Cf. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196. See also *General Investment Co. v. New York Central Railroad Co.*, 271 U.S. 228, 46 S. Ct. 496, 70 L. Ed. 920."

By like token, in the case at bar the Court is being asked to determine, by its declaration as to whether the theatres in question are or are not in substantial competition with each other, whether plaintiff Fox West Coast is free to solicit a prior run and clearance over the Belair Drive-In Theatre from the distributors within the circumscriptions [fol. 162] of the *Paramount* decrees.

In *New England Theatres, Inc. v. Lausier* (D.C. Maine), 86 Fed. Supp. 852, the court was expressly called upon to determine the identical question in an action for declaratory relief, to-wit, the existence or non-existence of competition between two theatres in the town of Biddeford, Maine. The plaintiff, New England Theatres, Inc. was a subsidiary of Paramount Pictures, Inc. and had entered into a pooling agreement involving its Central Theatre in Biddeford, Maine, with the defendant Louis Lausier, lessee of the City Theatre in Biddeford, Maine. The complaint alleged that the *Paramount* decree enjoined " \* \* \* making or continuing to perform pooling agreements whereby given theatres of two or more exhibitors *normally in competition* are operated as a unit". (Italics ours.) The question for determination was whether or not in fact the Central Theatre and the City Theatre were "normally in competition". In adjudicating this issue the court stated, page 854:

"Plaintiffs, in this Court, sought to bring about a final determination of the validity of the contracts by means of a summary judgment. Hearing was had and briefs were filed. It was adjudged, as a result of the summary judgment proceeding that: 'A pooling agreement exists between one of the plaintiffs and the defendant, whereby the theatres under their control are operated as a unit. Their policies are collectively determined, and profits are shared by a pre-arranged percentage.'

However, the Court found that: 'There appears a genuine issue as to whether such theatres would be "normally in competition" in the absence of any pooling agreement, such issue being one of a material fact.'

A full hearing has been held on the merits relating to this issue. Since the hearing, this Court has denied a motion by defendant that the case be dismissed for lack of jurisdiction of the parties and the subject matter; and, upon motion of plaintiff, this Court has refused to permit defendant to obtain certain further evidence by means of a deposition.

The issue before this Court is a narrow one: Are the two Biddeford theatres, the City and the Central, 'normally in competition' within the meaning of that phrase



as used in the decree of the Expediting Court? *United States v. Paramount Pictures, Inc., et al.*, D. C. S. D. N. Y. 1946, 66 F. Supp. 323, affirmed in part, reversed in part, 1947, 335 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260. The plaintiffs contend that they are normally in competition; the defendant contends that they are not normally in competition."

The opinion then proceeds to demonstrate that the thea- [fol. 164] tres in question are normally in competition and hence that the pooling agreement must be terminated.

With the exception of the *Southside* and *New England Theatres* cases above cited, the line of authorities most closely analogous to the present action for declaratory relief are those under which a business competitor brings an action to have the validity or invalidity of a patent declared under circumstances where the patentee is threatening the plaintiff and his customers with suits for infringement. The first case which recognized this application of the Declaratory Judgment Act is the oft cited decision of Judge Patterson in *Zenie Bros. v. Miskend*, (D.C.N.Y.) 10 Fed. Supp. 779, where the court said, page 781:

"There is a measure of truth in the statement that the plaintiffs are making a showing of invalidity like that generally made in defense of suit for infringement. Yet it does not follow that their only purpose is to obtain in advance a ruling that they will have a good defense if sued later for infringement. Their interest in the controversy is much more practical. Under the facts pleaded, the defendants are threatening their customers with suits for infringement of a worthless patent and are disrupting their business."

[fol. 165] Similarly, in *Brisk Waterproofing Co., Inc. v. A. Belanger & Sons*, C. A. 1, 209 Fed. 2d 169, the defendant in an action for declaratory judgment had circularized plaintiff's customers, notifying them that they might be sued for contributory infringement if they used plaintiff's product. In affirming the jurisdiction of the trial court, Judge Woodbury said, page 170:

"The first two points do not warrant extended discussion. The defendant's letter threatening suit for infringement if the plaintiff should build a wall according to the system described in its circular, coupled with statements in the plaintiff's affidavits and depositions that the plaintiff was seriously engaged in promoting its system and that the defendant had informed one of the plaintiff's prospective customers that its system would infringe the defendant's patent, clearly shows the existence of a case of actual controversy within the court's patent jurisdiction, and hence establishes a cause of action under the Declaratory Judgments Act. See *Dewey & Almy Chemical Co. v. American Anode Inc.*, 3 Cir., 1943, 137 F. 2d 68, certiorari denied 320 U.S. 761, 64 S.Ct. 70, 88 L. Ed. 454."

Other cases which have held that threats of infringement litigation against persons dealing with the plaintiff give [fol. 166] rise to an actual controversy justifying the maintenance of an action for declaratory judgment upon the question of patent invalidity or non-infringement are:

*Tremond Co. v. Schering Corp.* (C.A. 3) 122 Fed. 2d 702, 703.

*Lances v. Letz* (C.A. 2) 115 Fed. 2d 916, 917.

*Creamery Package Co. v. Cherry-Burrell Corp.*, (C.A. 3) 115 Fed. 2d 980, 983.

*Caterpillar Tractor Co. v. International Harvester Co.* (C.A. 9) 106 Fed. 2d 769, 772.

*E. W. Bliss Co. v. Cold Metal Process Co.* (C.A. 6) 102 Fed. 2d 105, 108.

*Dewey & Almy Chemical Co. v. American Anode* (C.A. 3) 137 Fed. 2d 68, 70.

See also, 6 Moore's Federal Practice, Second Edition, Paragraph 57.20, pages 3117-3121.

In the interests of brevity we refrain from quoting from these cases but urge them upon the court's attention for their clear holding that threats by a business competitor of litigation if particular business conduct continues to be employed gives rise to a justiciable controversy within the Declaratory Judgments Act.

[fol. 167]

*The Jurisdiction of the Trial  
Court Is Not in Issue*

Overlooked, or ignored, by Petitioner is the undeniable fact that jurisdiction has been obtained over the person of the defendant by service of summons and copy of the complaint; that the matter in controversy is alleged to exceed the sum or value of \$3,000, and that there is diversity of citizenship between plaintiff and defendant. As it seems clear from what has been said above that the complaint at bar adequately states a claim for declaratory and equitable relief and discloses an actual controversy between the parties, the *jurisdiction* of the court is not open to question.

### III.

#### THE PETITION WAS UNTIMELY FILED

The order of the Respondent separating the issues for trial was made on March 21, 1957 (Response, p. 3 line 20). The declaratory relief action was set for trial on July 8, 1957. It was not until on or about June 2, 1957 that the Petitioner submitted its Application for leave to file the present petition. We do not believe that this court should encourage or permit this untoward interference with the trial court's calendaring of cases by entertaining the Petition (see page 3 of the Slip Opinion in Institutional Drug Distributors), particularly in a case which qualifies for [fol. 168] and has been granted priority of setting (F.R.C.P. Rule 57).

Without the unexplained delay on the part of Petitioner of more than two months—more than double the time within which an appeal may be taken from a judgment—this court would most probably have been able to dispose of the Petition without the loss to plaintiff and intervenor of their advantageous and eagerly sought trial date in July.

#### CONCLUSION

Throughout this brief we have questioned the *remedy* being sought by the Petitioner in pursuit of an interlocutory writ of mandamus and have stressed the restricted exercise of the power of the Court of Appeals under the All Writs Act. Strictly upon the merits, however, we do not believe

the court can do otherwise than to wholeheartedly approve the sound exercise of his discretion by the Respondent Judge.

Exercising his discretionary power under FRCP Rules [fol. 169] 42(b) and 39(a)(2),<sup>9</sup> the court refused to permit the plaintiff's efforts to secure an early judicial declaration of its rights by the court to be stultified by the defendant's unverified charges of wrongdoing under the anti-trust laws and its demand for a jury determination of all issues. The court properly recognized that the doors of the Federal Judiciary are not closed to one charged with violating the Sherman Act<sup>10</sup> and that if there was any substance to [fol. 170] the defendant's cross-claim it would be entitled to its day in court<sup>11</sup> and to its jury trial. The trial court did what Judge Yankwich did in the *Institutional Drug* case except that it assiduously ruled out from the issues to be tried by the court, the anti-trust charges as to which defendant was entitled to its jury trial.

The Respondent Judge has pointed the way to the facile, expeditious and amicable judicial resolution of such controversies as may arise over clearances" and we urge this court to sustain him in all respects by denying the petition.

Respectfully submitted,

Newlin, Tackabury & Johnston, By /s/ Frank R. Johnston, By /s/ Hudson B. Cox, Attorneys for Respondent.

<sup>9</sup> Rule 42(b) "*Separate Trials*. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issues or of any number of claims, cross-claims, counter-claims, third-party claims, or issues." Rule 39(a) "*By Jury*. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless . . . (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

<sup>10</sup> Cf. *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 549-591, 46 L. Ed. 679; *A. B. Small Co. v. Lamborn & Co.*, 267 U.S. 248, 253, 69 L. Ed. 597; *Standard Oil Co. v. Markham* (D.C.S.D.N.Y.) 61 F. Supp. 813, 815.

<sup>11</sup> More properly, "weeks in court" in the trial of an anti-trust action.

[fol. 171]. Minute entry of argument and submission—  
September 13, 1957 (omitted in printing).

[fol. 172]

IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Before: Healy, Pope and Chambers, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION—  
January 7, 1958

Ordered that the typewritten opinion this day rendered  
by this Court in above cause of petition for writ of man-  
damus be forthwith filed by the Clerk.

[fol. 173]

IN UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 15,614

BEACON THEATRES, INC., a corporation, Petitioner,

v.

THE HON. HARRY C. WESTOVER, Judge of the United States  
District Court of the Southern District of California,  
Central Division, Respondent.

On-Petition for Writ of Mandamus.

Before: Healy, Pope and Chambers, Circuit Judges.  
Pope, Circuit Judge.

OPINION—January 7, 1958

This is an original application by Beacon Theatres, Inc.,  
seeking a writ of mandamus directed to the respondent  
Judge requiring him to take action to vacate certain orders



made by him which petitioner asserts will operate to deprive petitioner of its right to trial by jury of certain issues presented by the pleadings in a case still pending in the respondent's court.

The petition for the writ and the response disclose that the parties to the pending litigation, Fox West Coast Theatres Corporation, plaintiff, and Beacon Theatres, Inc., defendant, are owners of theatres in or near the City of San Bernardino, California. The plaintiff, here called Fox, a Delaware corporation, owns the "California Theatre". The defendant, here called Beacon, a California corporation, is owner or lessee of the "Bel-Air Drive-In Theatre" situated some 11 miles distant from Fox's theatre. On October 31, 1956, Fox filed in the respondent's court a complaint against Beacon which was entitled "Complaint for Declaratory Relief". The complaint alleged the requisite amount in controversy and both diversity of citizenship [fol. 174] of the parties and that the controversy arose under the laws of the United States, (the Sherman and the Clayton Acts). It stated that heretofore the plaintiff had received licenses from the major distributors of motion pictures in the United States, namely, Paramount Pictures, Inc., RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., Twentieth Century-Fox Film Corporation, Columbia Pictures Corporation, Universal Films Exchanges, Inc., Loew's Incorporated, and United Artists Corporation, whereby Fox had been given the right to first-run exhibition of motion pictures in the "San Bernardino competitive area", with reasonable periods of clearance or protection prior to subsequent run or exhibition in that area. Quoting: "That the right so [to] negotiate with the Distributors for first-run exhibition of motion pictures in said San Bernardino competitive area and to negotiate for a reasonable period of clearance or priority of run over subsequent exhibitions of the same motion picture in said area are and each of them is a valuable property right of plaintiff and of plaintiff's said California Theatre, the deprivation of which would result in substantial monetary damage and loss to plaintiff." It continues that defendant Beacon had recently constructed a drive-in theatre with a capacity for approximately 1000 automobiles; that the theatre was

within the San Bernardino competitive area; and that the average driving time between plaintiff's and defendant's theatres was not more than 20 minutes; that the plaintiff's California Theatre was substantially competitive with defendant's Bel-Air Drive-In Theatre; that there were other theatres in that area substantially competitive with those of plaintiff and defendant and that in consequence any one theatre may validly be granted clearance over all the others within the purview of the opinion and findings of a Special Expediting Court in the case of United States of America, plaintiff, v. Paramount Pictures, Inc., et al., defendants, Equity No. 87-273, rendered in the United States District Court for the Southern District of New York and entered on February 8, 1950;<sup>1</sup> Paragraphs XI and XII are as follows:

"XI. An actual controversy relating to the legal rights and liabilities of plaintiff and defendant exists [fol. 175] and arises out of the following facts: Defendant contends that its theatre is not in substantial competition with plaintiff's California Theatre, or with other theatres located in the San Bernardino competitive area, and that it is entitled to exhibit mo-

<sup>1</sup> The complaint quotes the following definitions from the opinion in that case as follows: "Runs—The successive exhibition of a motion picture in a given area, first run being the first exhibition in that area, second run being the next subsequent and so on.

"Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres."

From the findings in that case the complaint quotes the following: "76. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later exhibiting theatre at lower than prior rates.

"77. A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration affords a fair protection of the interest of the licensee in the run granted without unreasonably interfering with the interest of the public.

"78. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures. The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business."

tion pictures distributed by the above named Distributors day and date, that is to say simultaneously, with their first-run exhibition in the San Bernardino competitive area, and that neither the plaintiff nor the other owners and operators of theatres within said area are entitled to negotiate with said Distributors for any clearance over defendant's Bel-Air Drive-In Theatre.

"Plaintiff contends that its California Theatre is substantially competitive with defendant's Bel-Air Drive-In Theatre on first-run in said area, and that the other said theatres in the San Bernardino area are each of them substantially competitive with each other, to an extent justifying the granting of clearance to one theatre over others within the purview of the opinion and findings of the Special Expediting Court in *United States v. Paramount Pictures, Inc., et al.*, above referred to, and that the granting of clearance by the Distributors would not be within the injunctive provisions against the granting of any clearance to theatres not in substantial competition [fol. 176] within the meaning of the consent decrees and final decrees in said action above referred to.

"Plaintiff further contends that it has an equal right with the defendant to negotiate with each Distributor independently for a prior run for plaintiff's California Theatre ahead of any other theatre, including defendant's Bel-Air Drive-In Theatre, in said competitive area and that there is no obligation on the part of any Distributor in such a case to grant an equal and simultaneous run to defendant's said Bel-Air Drive-In Theatre.

"XII. The defendant, in addition to contending that its said Bel-Air Drive-In Theatre is not substantially competitive with any other theatre in the San Bernardino area on first-run exhibition in said area, has threatened plaintiff and has stated to plaintiff in substance and effect that it has threatened the Distributors above mentioned that if plaintiff's said California Theatre is granted any clearance over defendant's Bel-

Air Drive-In Theatre, or is granted a prior run, said action on the part of plaintiff will be deemed by defendant to be an overt act in concert with any distributor who may grant plaintiff such clearance or such priority of run in restraint of trade and a violation of the Sherman Antitrust Act and of the decrees of the Special Expediting Court in *United States v. Paramount Pictures, Inc., et al.*, and the plaintiff will be subjected to an action by said defendant for treble damages under Section 4 of the Clayton Act (Title 15 USC Section 15). That said threats and the duress and coercion upon the Distributors arising out of and resulting from said threats of litigation threaten to and have in fact deprived plaintiff and its said California Theatre of the right to negotiate for motion pictures upon their first-run in the San Bernardino area and to negotiate for clearance over theatres in competition with plaintiff's said theatre upon said first-run, including defendant's Bel-Air Drive-In Theatre. That plaintiff is without any speedy or adequate remedy at law and will be irreparably harmed unless defendant and its officers, agents and employees, are restrained and enjoined from instituting any action [fol. 177] under the anti-trust laws against plaintiff and said Distributors, or any of them, based upon the facts hereinabove alleged during the pendency of this action and until such time as the court shall determine whether or not the plaintiff and defendant have an equal and correlative right to license a prior run with clearance on behalf of their respective theatres."

The prayer was for an adjudication that a grant of clearance between these theatres on first run was reasonable and not a violation of the anti-trust laws; and that the distributors mentioned were entitled to negotiate with Fox and Beacon and other theatre owners equally for prior runs in that competitive area; that pending final decision Beacon be restrained and enjoined from commencing any action under the anti-trust laws against Fox and against the distributors, and that the court grant such further relief, equitable or otherwise, as it deemed proper or necessary in the premises.

Thereafter Beacon filed its "Answer, Counter-Claim and Cross-Claim and Demand for Jury Trial", in which it put in issue the allegations of the complaint.<sup>2</sup> The counterclaim and cross-claim contained extensive allegations asserting that the plaintiff and certain other owners of local theatres at or near San Bernardino, together with the above mentioned distributors, entered into an agreement, combination or conspiracy in unreasonable restraint of trade in violation of §1 of the Sherman Act and a continuing combination and conspiracy to monopolize trade and commerce in violation of §2 of that Act. Beacon asked judgment in its favor on the cause of action asserted in plaintiff's complaint. It prayed for judgment against Fox (and against another local theatre owner which had intervened on the side of Fox) for three-fold damages in the sum of \$300,000, and for injunction against continuation of the alleged conspiracy. Jury trial was demanded "with respect to the complaint, answer, counterclaim and cross-claim."

[fol. 178] Asserting that defendant Beacon was not entitled to have the issue presented by the complaint tried to a jury, Fox moved to strike the demand for jury trial on the complaint and the answer thereto. The respondent Judge granted the motion and ordered the issues presented by the plaintiff's complaint to be tried to the court without a jury; he also granted the plaintiff's further motion for a separation of the issues raised by the complaint and the answer thereto from the anti-trust issues raised by the defendant's counterclaim and cross-claim,<sup>3</sup> and ordered the issues under the complaint and the answers thereto to be tried to the court without a jury in advance of and separately from defendant's counterclaim and cross-claim for damages under the anti-trust laws.

<sup>2</sup> By way of further answer and affirmative defense Beacon alleged the making of an agreement and conspiracy in restraint of trade and to monopolize trade and commerce in violation of the Sherman Act, which was also set forth in defendant's counterclaim. This portion of the answer was stricken on motion.

<sup>3</sup> As noted above, the answer set forth as a "further answer" and as an "affirmative defense" the same conspiracy alleged in the counterclaim. This order also struck these portions of the answer.



Thereupon Beacon, after procuring leave from this court filed the petition now before us praying for a writ of mandamus requiring the respondent to vacate his order striking the demand for jury trial as to the complaint and answer and the order setting for trial the issues of the complaint prior to the trial of the counterclaim, and that respondent be directed to proceed with a jury trial of all issues of the complaint, answer and counterclaim susceptible of such mode of trial. The petition sets forth the history of the proceedings in the respondent court as above outlined and no issue of fact in respect thereto is raised by the response.

Beacon asserts that the orders of the respondent above mentioned which petitioner seeks to have vacated and cancelled, will operate to deprive petitioner of its right to a jury trial, and that if the respondent proceeds, as he proposes to do, the jurisdiction of this court and its opportunity to hear an appeal from any final judgment in the case would be frustrated in that the whole trial without a jury would go for naught and the whole case would have to be tried again. Under these circumstances, Beacon says, the extraordinary writ of mandamus in this court is the appropriate remedy, citing in support of that position *Ex [fol. 179] Parte Simons*, 247 U.S. 231; *Ex Parte Peterson*, 253 U.S. 300; *Ex Parte Skinner & Eddy Corp.*, 265 U.S. 86; and *U.S. Alkali Assn. v. United States*, 325 U.S. 196.\*

The primary question to be determined by us is whether petitioner is correct in its claim that it was the duty of the respondent to proceed in such manner as to afford petitioner a jury trial upon all the issues presented by its counterclaim. It will be noted that if matters proceed in the respondent's court in the manner now directed, the court, sitting without a jury, will first try the issues raised by the complaint of Fox and the answer of Beacon thereto, including the issues between the parties as to whether Beacon's theatre is in substantial competition with Fox's California Theatre or with other theatres located in the San Bernardino area.

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\* Petitioner also cites to the same effect: *Bereslavsky v. Caffey*, 2 cir., 161 F. 2d 499; *Bereslavsky v. Kloeb*, 6 cir., 162 F. 2d 862; *Canister Co. v. Leahy*, 3 cir., 191 F. 2d 255; it contends that its position is sustained by the reasoning in *La Buy v. Howes Leather Co.*, 352 U.S. 249.

Beacon's position is that the real controversy between the parties is whether it is entitled to recover from Fox damages for the latter's alleged violation of the anti-trust laws. It says that by filing its suit for declaratory relief Fox has merely anticipated this suit for damages in which it was a prospective defendant and in which a right to trial by jury would exist; that if a court may do what respondent has done here, then any time a prospective defendant anticipates that he is about to be sued in an action at law he could avoid a trial by jury by first filing a complaint for declaratory relief and thus deny a prospective plaintiff the jury trial which the latter is entitled to have under the Seventh Amendment. Petitioner relies principally upon this court's decisions in Pacific Indemnity v. McDonald, 107 F. 2d 446, and Dickinson v. General Accident F. & L. Assur. Corp., 147 F. 2d 396.

In the McDonald case, an insurance company sought a declaratory judgment as to its liability on an automobile insurance policy, alleging that it was relieved of liability on the policy because of the insured's refusal to cooperate [fol. 180] as required by the policy, through fraudulent collusion with the injured party. The trial court tried the question of collusion without a jury and ordered the other issues raised by the complaint to be tried by a jury. The judge made findings against the insurance company upon the issue which it tried, and there was verdict and judgment for the defendants. Plaintiff appealed contending that the entire case should have been tried by the court without a jury. This court held that the entire case should have been submitted to the jury, saying: "It follows from what we have said that we simply have a situation herein where a party who has issued a policy of insurance anticipates a suit thereon by the insured or one subrogated to his rights and to avoid delay brings the matter before the court by petition for declaratory relief. In such a proceeding, although the parties are reversed in their position before the court, that is, the defendant has become the plaintiff and vice versa, the issues are ones which in the absence of the statute for declaratory relief would be tried at law by a court and jury. In such a case, we hold that there is an absolute right to a jury trial unless a jury has been waived." (p. 448)

The Dickinson case was also an action by an insurance company seeking declaration of non-liability on an automobile insurance policy. The defendants sought affirmative relief and a money judgment. Their demand for a jury trial was granted but the verdicts returned for them were treated by the trial court as advisory only and the court rejected them and made its own findings for the plaintiff insurance company. This court reversed, citing its decision in the McDonald case, and holding that the right to a jury trial of such factual issues ordinarily triable to a jury was expressly preserved by the declaratory judgment statute.

Asserting that the facts here are substantially the same as those in the McDonald and Dickinson cases, petitioner says: "Fox West Coast has elected to escape from the role of defendant and become a plaintiff for the express purpose of avoiding the inevitable trial by jury of a suit for damages under the Sherman Act." If this case were as simple as the McDonald and Dickinson cases, its decision would present few difficulties.<sup>3</sup> Rule 57, Rules of Civil Procedure, relating to the procedure for obtaining a declaratory judgment preserves the right to trial by jury in [fol. 181] cases of that character.<sup>5</sup> But the case presented here, as we see it, is more difficult.

The complaint which was filed in the respondent's court seeking declaratory judgment contains not merely the allegations of the circumstances of the actual controversy between the parties with respect to whether their theatres are substantially competitive with each other, and as to whether the plaintiff Fox could properly negotiate for prior runs and clearances within the meaning of the Paramount Pictures decree; in addition it contains allegations which Fox says show that it is entitled to equitable relief

<sup>3</sup> "Rule 57. Declaratory Judgments—The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

against threatened conduct on the part of Beacon which, unless enjoined, will operate seriously to interfere with the operation of Fox's California Theatre and cause Fox irreparable injury and damage for which it has no adequate remedy at law. In other words, Fox contends that its complaint in respondent's court sets forth grounds entitling it to relief in equity and that its complaint is more than a mere application for declaratory relief.

It seems obvious that if this contention be correct, and if the case presented by the complaint falls within the category of a recognized and traditional suit in equity, then we have a problem here which was not presented in either the McDonald or the Dickinson cases. The question is, if plaintiff files a suit in equity against the defendant, and defendant responds with a cross-action at law against the plaintiff, and if some issues are common to both the suit in equity and the action at law, is it the duty of the trial judge to try both cases simultaneously or to try the action at law first, or is it within the discretion of the judge to try the equity suit first? If it be assumed that ordinarily the trial judge has such discretion, is that discretion qualified or modified under circumstances shown to exist in this particular case? In an effort to deal with [fol. 182] these questions we proceed first to inquire whether Fox's original complaint did set forth grounds for the exercise of equitable jurisdiction.

The allegations which are relied upon as stating a basis of equitable relief by way of injunction are set forth in paragraph XII of the complaint and have been quoted above. There it is alleged that Beacon has threatened Fox and has threatened the named distributors of films that if Fox's California Theatre is granted any clearance over Beacon's theatre or granted a prior run, defendant will treat that as an overt act on the part of the distributor and the plaintiffs in restraint of trade and in violation of the Sherman anti-trust act; and that in that event defendant will sue for treble damages under the Clayton Act. It is further alleged in substance that these threats amount to duress and coercion upon the distributors which operate to deprive the plaintiff of its right to negotiate for motion pictures upon their first run in the area and



to negotiate for clearance over competing theatres including defendant's theatre; that plaintiff is without any speedy or adequate remedy at law and will be irreparably harmed unless defendant be restrained and enjoined from continuing these threats and from instituting any action under the anti-trust laws against plaintiff and the distributors.\*

It is well settled that where a defendant engages in conduct or threatens to engage in conduct calculated to violate or interfere with a plaintiff's right of property or of contract, equity will enjoin that conduct in any case in which it appears that the plaintiff is without an adequate remedy [fol. 183] at law. Cf. Pomeroy's Equity Jurisprudence, 5th Ed., §1338. And this is true although the property or contract or other similar rights which plaintiff seeks to protect may be said to be legal rights. Furthermore, it is also clear that the rights which are entitled to protection of this kind, fall within a very broad definition of property or contract rights;—they include within the category of property rights "any civil right of a pecuniary nature." *International News Serv. v. Asso. Press*, 248 U.S. 215, 236.

\* It may be that the portion of the pleading here referred to is not a model of pleading. Thus, it refers to plaintiff's demand that defendant be "restrained and enjoined from instituting any action under the anti-trust laws." It seems plain from the allegations generally, and from the prayer for general equitable relief that plaintiff was seeking an injunction not merely against the institution of an anti-trust suit but against the threats, duress and coercion upon the distributors.

We read the allegations in the light of the rules for construing pleadings laid down in *Conley v. Gibson*, \_\_\_\_\_ U.S. \_\_\_\_\_, decided November 18, 1957. The same rule requires us to disregard the fact that plaintiff alleged that defendant "has stated to plaintiff in substance and effect that it has threatened the distributors", instead of alleging in so many words that defendant has threatened the distributors.

† "In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right (cases cited); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired."



This right to protection by way of injunction against interference with property or contracts or other pecuniary rights, has been applied so as to protect a person in his right to earn a livelihood and to continue in employment unmolested by efforts to enforce void state statutes. *Truax v. Raich*, 239 U.S. 33.

Recently this court applied the same rule in the protection of the right of merchant seamen to seek prospective employment in order to earn a livelihood. It stated that such right "was one entitled to protection at the hands of a court of equity. . . . The right of action here would appear to be founded upon the same equitable principles declared in the *Truax* case." *Parker v. Lester*, 227 F. 2d 708, 713. In *Metro-Goldwyn-Mayer Corp. v. Fear*, 9 cir., 104 F. 2d 892, 899, this court held that a plaintiff was entitled to injunctive relief against intentional and wrongful acts operating to interfere with the plaintiff's probable expectancy of having its customers continue to deal with it. In that case, the appellee, holder of a patent covering a film developing machine, the use of which had been licensed to plaintiff, and which plaintiff used in developing film procured from its customers, sent letters to the plaintiff's customers threatening to sue them for infringement. This court held that the sending of these letters was improper; that there was a reasonable probability that damages would result from such conduct, and "under such circumstances, the appellant was entitled to an injunction." In so holding it is plain that this court recognized that a reasonably [fol. 184] probable expectancy of economic advantage from prospective dealings with others, is in the nature of a property right entitled to protection through the issuance of an injunction in equity whenever it appears that there is not a complete and adequate remedy at law. "A large part of what is most valuable in modern life seems to depend more or less directly upon 'probable expectancy.'" *Jersey City Printing Co. v. Cassidy*, 63 N.J. Eq. 759, 765, 53 Atl. 230.\*

\* This case is cited with other cases dealing with "precontractual interferences" in *Harper & James*, "The Law of Torts", §6.11. Included is the celebrated case of *Keeble v. Hickeringill*, 11 East 574, 103 Eng. Rep. 1127, (1707) where defendant was charged

In *Berrien v. Pollitzer*, (D.C. cir.) 165 F. 2d 21, the court held that this right to protection by injunction even extended to a plaintiff's right not to be excluded from a political party's headquarters. The court points out that injunctions and similar equitable remedies are available for protection of rights which are not strictly property in the more limited sense of that term. The court quoted with approval the statement of the Supreme Judicial Court of Massachusetts: "We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions by which it will protect property rights by injunction."

Turning then to the complaint in this case, it is there manifest that Fox seeks protection for its "right to negotiate for motion pictures upon their first-run in the San Bernardino area and to negotiate for clearance over theatres in competition with plaintiff's said theatre upon said first-run including defendant's Bel-Air theatre." The authorities which we have cited disclose that a right so to negotiate, sufficiently partakes of the nature of a property right or sufficiently resembles a property right as to be entitled to protection through the use of the injunctive process against intentional and wrongful acts calculated to destroy it, provided only that there is not a complete or adequate remedy at law.

[fol. 185] It has long been recognized that a person having an existing contract for the acquisition of property or services or other things of value may have equitable relief by way of injunction against a third person who with knowledge of the contract performs acts designed to induce the breach of the plaintiff's contract. All that need be proven in such cases is that the attempted interference by the third person with plaintiff's contract and his attempts to induce the other party to the contract to breach

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with the deliberate discharge of firearms for the purpose of frightening wild ducks away from plaintiff's pond on which plaintiff had placed decoys. The authors said: "Here again, as in the case of inducing breach of contract, the principle is that intentional interference with another's efforts to enter into profitable contractual relations is actionable unless it falls within the area of socially acceptable conduct which the law regards as privileged."

it is done intentionally. *Meyer v. Washington Times Co.*, (C.A.D.C.) 76 F. 2d 988, 992. In the present case, it is not asserted that defendant is attempting to bring about a breach of presently existing contracts between the plaintiff and the distributors. As we have noted, the alleged threats and duress are designed to deprive plaintiff of its opportunity to negotiate for future contracts. The cases previously cited sufficiently show plaintiff's right thus to negotiate for contracts as a part of its normal method of doing business is as much entitled to protection as any property or contract right in the more traditional sense. This was recognized long ago by this court in *Sailors' Union of the Pacific v. Hammond Lumber Co.*, 156 F. 450, where we held that a plaintiff was entitled to an injunction to protect it in this right to contract to employ labor.

The same rationale supports the decisions upholding the issuance of injunctions to protect against unfair competition in which of course the anticipated damage to the plaintiff arises from his inability to conclude new contracts with prospective customers because of the wrongful acts of the defendant. The same reasoning supports the numerous decisions to the effect that the liability of a third person for procuring a breach of contract on the part of another is in no manner altered by the fact that the contract in question is one terminable at will.<sup>2</sup>

It sufficiently appears here that threats addressed to the distributors threatening suit or prosecution under the anti-trust acts would be calculated to make it impossible for plaintiff to negotiate for or procure such first-run pictures or clearance from the distributors. The acts of the defendant Beacon which are here complained of are not different from the threatening letters of the defendant [fol. 186] in *Metro-Goldwyn-Mayer Corp. v. Fear*, supra, with respect to which this court held the plaintiff was entitled to an injunction. It is also plain that so far as an action by the plaintiff is concerned, it has available to it no adequate remedy at law. As this case reaches us we must assume that the plaintiff is in a position to prove and establish the facts alleged in its complaint. If those facts

<sup>2</sup> See the numerous cases collected in a note at 84 A.L.R. pp. 60 to 63.

be true, then plaintiff was likely to be obliged to operate its California Theatre without the advantage of first-runs or clearances, for some if not all of the distributors were likely to be deterred from so dealing with plaintiff because of Beacon's threats. Such threats carry with them the implication that the distributors also may have to defend treble damage suits. At any rate, just how much effect these allegedly wrongful acts of the defendant will have, and how much the damages will amount to are not susceptible to ready ascertainment. As this court said in *Sailors' Union of the Pacific v. Hammond Lumber Co.*, supra, (p. 455) "One ground of equitable jurisdiction in cases of continuing trespass is the fact that the measure of damages is exceedingly difficult of ascertainment. . . . And relief by injunction may be invoked as a remedy for the destruction of one's business, if in such a case no action at law would afford as complete, prompt and efficient a remedy."

This brings us to the question whether as the case now stands in the respondent's court, Fox may be said to have an adequate remedy at law through its opportunity to defend the counter action brought against it by Beacon. We think that the question whether the plaintiff stated a claim properly triable before the court sitting in equity must be judged as of the time when the complaint was filed. At that time, October 31, 1956, the defendant had brought no suit; all that plaintiff was confronted with at that time were the threats and duress directed to it and to the distributors. The counterclaim was not filed until February 18, 1957. Obviously prior to the time when it filed its complaint plaintiff was not in a position to compel the bringing of an action by the defendant at any stated time. Consistently with the allegations of the complaint defendant, unless enjoined, could go on indefinitely threatening the distributors and the plaintiff with future suits; as long as the threats worked, defendant would have its way and the business of the plaintiff would be seriously limited. [fol. 187] We think that we must accept what was said in a somewhat comparable case of *Amer. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215, "The argument is made that the suits in equity should have been dismissed when it



appeared upon the trial that after the filing of the bills, and in October, 1932, the beneficiaries of the policies had sued on them at law. But the settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter."<sup>10</sup>

In directing that the issues raised by the complaint be tried separately from defendant's counterclaim and cross-claim for treble damages, the respondent purported to act under the authority of Rule 42(b) Rules of Civil Procedure: "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." The question is whether, notwithstanding that provision, some other rule or requirement relating to the right to trial by jury prohibited the respondent from directing that the issues raised by the complaint be first tried by the court without a jury and that the issues raised by the counterclaim be tried subsequently. There is no doubt that that procedure if carried out will operate in some degree to limit the petitioner's opportunity fully to try to a jury every issue [fol. 188] which has a bearing upon its treble damage suit.

<sup>10</sup> We assume that if Beacon's action for treble damages was actually filed and pending on the date when plaintiff filed its complaint, that plaintiff might have had an adequate remedy at law by interposing its defense to Beacon's action. While we make that assumption for the purpose of this case, it is not altogether certain that such defense would furnish an adequate remedy. Thus throughout the period that the treble damage suit was pending, Beacon might well continue to make threats of the same nature against the distributors, threatening a series of such suits against them collectively or severally.

Conceivably this could continue at least until the treble damage suit had finally terminated in some court of last resort. It might possibly continue thereafter if Beacon claimed that additional or new facts then warranted a new round of treble damage suits. The very pendency of Beacon's suit throughout that time would tend to reinforce the strength of the threats. Moreover, we do not overlook the circumstance that because of its penalty aspects a threat of a treble damage suit is potentially more frightening than threats of an ordinary damage action.



The complaint, as noted, presents the issue as to the existence of substantial competition between the parties in the San Bernardino area. This also is an issue raised by the counterclaim. Petitioner is correct in saying that if this issue be first tried and determined by the court in its proposed first trial the determination of that issue by the court will operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.

It seems plain enough that a party who is entitled to maintain a suit in equity for an injunction may have the issues therein determined by the court without a jury notwithstanding they involve a trial and determination of legal rights. No authority need be cited in support of this proposition, for illustrations of such cases are numerous. For example, in a suit by one in possession of real property to quiet title, or to remove a cloud on title, the court of equity may determine the legal title. In a suit for specific performance of a contract, the court may determine the making, validity and the terms of the contract involved. In a suit for an injunction against trespass to real property, the court may determine the legal right of the plaintiff to the possession of that property. Cf. Pomeroy, Equity Jurisprudence, 5th ed., §§138-221, 221a, 221b, 221d, 250.

Petitioner asserts that notwithstanding all this, the requirements of the Seventh Amendment and of Rule 38 of the Federal Rules of Civil Procedure which recites that the right of trial by jury as declared by the Seventh Amendment shall be preserved to the parties inviolate, operates to qualify the court's right to order a separate trial of any claim under Rule 42(b), supra, so that under the circumstances here present, where both an equitable and a legal cause of action are present in a single proceeding, the court must of necessity try the legal claim first so that any issue of fact common to both actions may first be tried by jury. Some of the language used by this court in *Bruckman v. Hollzer*, 152 F. 2d 730, lends support to such an argument. In that case, the complaint sets forth separately three sets of transactions upon which

plaintiff claimed relief. In the first count, plaintiff sought recovery for money damages on account of alleged infringement of copyrights; in the second count, plaintiff [fol. 189] sought an accounting for profits received by defendant through the appropriation of copyrighted matter; in the third count it was alleged that the defendant had infringed and intended to continue to infringe plaintiff's copyright, and plaintiff sought to enjoin the defendant from so continuing in such wrongdoing. Judge Hollzer, the respondent, who was the district Judge before whom the action was pending, ruled that he would commit the trial of the first cause of action to a jury to be tried at common law, and in his return to the petition for writ of mandamus, stated that he would simultaneously try without the jury the second and third causes of action "to the extent practicable." The defendants in the action then petitioned this court for mandamus to compel the respondent Judge to strike the demand for a jury trial and to hear and determine without a jury all three claims. It was noted that the issue of infringement was common to all three sets of transactions, and that if the right of jury trial of the issues raised by the first count was to be preserved, the jury's verdict upon that count would have to be entered before the claims under the second and third counts were decided. It was said that a consideration of Rule 33(a), preserving the right of trial by jury, when read in connection with those provisions of the rules which permit district courts to hear both equity and common law claims in a single suit, made it mandatory that the trial judge try the cause of action properly triable to a jury before the others. It was suggested that this was the only manner in which the right to trial by jury could be preserved. The court indicated that a change had been effected by the adoption of the rules which it says accomplished "a long forward step in our judicial procedure."

It is to be noted, however, that the court simply denied the writ of mandamus. The respondent Judge there had ruled that he would permit the return of a verdict in the common law action in advance of the entry of any findings by the court upon the second and third causes of action,

which were taken to be equitable in character. What this court said about the trial judge being *required* first to try with a jury the issues in the first cause of action was unnecessary to the decision. The actual decision was just as consistent with the view that it was within the [fol. 190] discretion of the district Judge under Rule 42(b) to determine which causes of action should be tried first.

This court has had occasion in later decisions to point this out, and in each instance it has rejected arguments that the Hollzer case decided that the judge must first try the legal cause of action. In *Tanimura v. United States*, 9 cir., 195 F. 2d 329, the United States sued Tanimura for violation of maximum rent regulations and sought (1), an injunction against further violations; and (2), treble damages for the overcharges prior to the institution of the suit. The trial judge first tried the issues upon which the government based its claim to an injunction. The case went against Tanimura who objected that he was entitled as of right to a jury trial. We said: "It was within the sound discretion of the court as to whether the equitable issues or the law issues should take precedence in trial." The opinion quoted from and followed *Orenstein v. United States*, 1 cir., 191 F. 2d 184. The appellant on petition for rehearing asserted that this ruling of the court was contrary to *Bruckman v. Hollzer*, *supra*. We noted, however, that the latter case was not to the contrary; that it merely held that the right of trial by jury extends only to issues not necessary or incidental to the equitable jurisdiction. This view (sic) of the Hollzer case was reinforced in *Institutional Drug Distributors v. Yankwich*, ..... F. 2d ....., (June 2, 1957), where this court in holding it to be within the discretion of the trial judge to decide whether the equitable cause or the common law cause should first be tried, said in footnote 10: "*Bruckman v. Hollzer*, . . . does not hold to the contrary, as it, in effect, merely affirms the election of the trial court to try jury and non-jury issues contemporaneously."

We think these later decisions correctly point out that the Rules of Civil Procedure referred to in the Hollzer case were not designed to make any substantial change in the right to jury trial or to alter any pre-existing right of the trial judge to determine in his discretion

whether trial of the suit in equity shall be prior to the submission of the issues in the legal action in any case where, as here, both types of action are presented by the pleadings. The rule stated in the *Tanimura* case, *supra*, is the same as that recognized prior to the adoption of the [fol. 191] rules, namely, that the question as to which of the two types of actions should be tried first remains primarily within the discretion of the trial judge and is for the determination of that judge after consideration of various factors of fairness and convenience. Thus in *Amer. Life Ins. Co. v. Stewart*, *supra*, where the plaintiff's bill in equity for cancellation of the insurance policies was followed by actions at law brought by the beneficiaries in the same court to recover the insurance, the court, after holding that the suit in equity was properly brought and was within the court's equitable jurisdiction, disclosed that the parties had stipulated that the suit in equity should be tried first. The court noted that had this stipulation not been made, a different arrangement might have been made, stating that in the exercise of a sound discretion the court could hold one action in abeyance to abide the outcome of another and said, (perhaps by way of dictum), that in the absence of the stipulation "If request had been made by the respondents to suspend the suits in equity till the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity. . . . There would be many circumstances to be weighed, as, for instance, the condition of the court calendar, whether the insurer had been precipitate or its adversaries dilatory, as well as other factors. In the end, benefits and hardship would have to be set off, the one against the other, and a balance ascertained." Plainly this suggests that after consideration of matters of the character there mentioned, it would be within the discretion of the court to determine which suit or action should be tried first. It thus appears that such was the case before the adoption of the Rules. Our decision in the *Tanimura* case, *supra*, says such is still the rule.

It was in that case that we adopted and approved the reasoning of the First Circuit in *Orenstein v. United States*, *supra*, a case in which certain identical questions of fact



were presented in both equitable and legal causes of action. That court noted that if the judge chose to exercise his discretion so as first to make findings of fact in the equity portion of the proceedings upon such common issues, those findings would be binding upon all parties, and in respect to them there would be no opportunity to relitigate them before the jury on the later trial of the legal action for damages.

Considerable reliance is placed upon the case of *General Motors Corp. v. California Research Corp.*, D.C. Del., 9 F.R.D. 565. In that case, apparently influenced by certain language used in *Moore's Federal Practice*, the court said (p. 568): "It seems equally clear that where the complaint contains matter which is equitable in character and the counterclaim is legal in character, the court must determine the nature of the basic issues and if these are legal in character a demand for a jury trial must be granted." The judge concluded that the basic issues in that case were legal in character and that he was obliged to order a jury trial. The basic "issue" test to which the court there referred was plainly enough appropriate under the facts of that particular case which was not only primarily but exclusively an action for declaratory relief. It sought declaratory judgment of invalidity of two patents and of non-infringement by the plaintiff. The action was purely negative in character seeking a declaration that plaintiff was not liable upon defendant's claimed cause of action, but there were no allegations similar to those contained in paragraph XII of the complaint in this case which would disclose any basis for an independent suit in equity.

It is true that the plaintiff in the *General Motors* case, just cited, added a prayer for an injunction against a suit by the defendant for infringement of defendant's patent, but as the court remarked, this prayer did not operate to create any basic issue. Obviously it was a mere adjunct to the prayer for a declaration of rights. In the present case the complaint would resemble the complaint in the *General Motors* case if it contained nothing beyond paragraph XI which is quoted above, and if paragraph XII were entirely omitted. What is wrong about the language quoted above from the *General Motors* case is its as-



sumption that the complaint contains matter which is equitable in character. The statement as quoted is dictum. The complaint contained no such matter. In an effort to make use of the general language thus quoted Beacon argues that a basic issue here was whether the theatres are competitive or not. The contention is that this issue, [fol. 193] which is common both to plaintiff's complaint in equity and to the cross-action at law, is necessarily legal in character and hence under the rule stated by the judge in the General Motors case, there must be a jury trial.

Where a typical complaint seeking declaratory relief, and nothing more, is filed, it is appropriate to adopt the language which Moore uses in dealing with such cases,—that the question as to the mode of trial “should be governed by a determination as to whether the basic nature of the issue is ‘legal’ or ‘equitable’.” The plaintiff seeking declaratory relief must contemplate that if he is seeking declaratory relief against a projected legal action by the defendant, the case will be for trial before a jury. Rule 57 so states.

But if the complaint be not a mere complaint seeking a declaration of rights but is in and of itself a statement of a claim within the exclusive jurisdiction of a court of equity, then the question is not so simple. If basically the nature of the plaintiff's complaint is one which alleges facts appropriate to a suit in equity such as the complaint now before us, the court is presented with a claim the basic nature of which is equitable, and it is of no consequence that some of the fact issues might under different circumstances be appropriate fact issues in an action at law.

As we have previously indicated, many questions of fact are appropriately presented either in a suit in equity or in an action at law. Thus the question of title or right to possession to land, viewed as a question of fact, is appropriate in an action of ejectment but it is equally appropriate in a suit to quiet title. That Moore recognized this, is plain from his discussion in the sections mentioned. Some of his statements are noted in the margin.<sup>11</sup> It is plain from his discussion that he would say that in this case,

<sup>11</sup> From §38.16, p. 152: 5 Moore's Federal Practice: “Under certain circumstances a party to a contract may have the choice of damages for breach, or specific performance and incidental damages. If he chooses to seek only damages the issues are legal; if he

[fol. 194] upon the filing of this complaint, all of the issues thereby presented were equitable. This is true notwithstanding that under other circumstances some of the same questions of fact presented in this suit in equity might also be questions of fact in an action at law.

We note that in *Leimer v. Woods*, 196 F. 2d 828, 836, the Eighth Circuit disapproved of the decision in *Orenstein v. United States*, supra, and cited with approval the *Bruckman* case without noting that the language of the latter case has been qualified and explained in *Tanimura, Institutional Drug Distributors*, supra, makes that plain. The *Leimer* case supports petitioner's position here,<sup>12</sup> but for the reasons we have indicated we cannot agree with it.

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chooses specific performance and incidental damages all the issues are equitable.

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"By way of contrast take a different case as where the plaintiff sues for specific performance, the defendant pleads certain matter as a defense, and then also uses that matter as a basis of a legal counterclaim. The basic issue is whether the plaintiff has a valid contract, which is entitled to specific performance; if this is determined in his favor by the court that ends the case; only in the event that the defendant prevails as to the factual basis of his defense would issues, probably only as to the amount of damages, remain for jury trial.

"Where the controlling issue in a case is whether a contract should be reformed, the basic issue is equitable: whether the plaintiff seeks reformation so that he is entitled to recover on the reformed contract; or whether the plaintiff seeks reformation and the defendant interposes a legal counterclaim to recover on the contract as written."

(p. 151) "And the same principles apply where the plaintiff claims damages for injury to his property, and also seeks an injunction against future acts: the legal claim is basic. Here, however, the plaintiff could formulate his claim as one for an injunction with damages as an incident thereto: the basic issue would then be equitable and would carry with it the determination of the damages.

"The basic nature of the issue in patent litigation will also depend upon the patentee's choice of remedy: an action by the patentee to recover damages under 35 USC §67 presents legal issues; an action by the patentee under 35 USC §70 for an injunction and damages presents equitable issues."

<sup>12</sup> The court there said: "In summary, a federal court may not under the Rules of Civil Procedure, in a situation of joined or

[fol. 195] It is our view that it is the doctrine of both the Tanimura and the Institutional Drug Distributors cases that the determination pursuant to Rule 42(b) as to whether the legal or the equitable claim or cause of action should first be tried is within the discretion of the trial judge. Of course, in exercising that discretion he should have in mind the considerations noted in the language previously quoted from *Amer. Life Ins. Co. v. Stewart*, supra, where it is suggested that the circumstances to be weighed are: whether plaintiff was precipitate or defendant dilatory, the condition of the court calendar, and the benefits and hardships involved. The time for weighing those considerations was when the respondent made his order. Nothing here indicates an abuse of that discretion.

No suggestion is made here that because the respondent judge could proceed to try the equitable injunction suit first, he could then proceed and take the further step of trying the questions presented by the counterclaim for damages under the ancient rule that the Chancellor may retain jurisdiction so as to grant complete relief. The respondent's order made it plain that there was no such proposal here. No doubt the statute requires the damage claim to be tried by jury. Cf. *Decorative Stone Co. v. Building Trades Council*, 2 cir., 23 F. 2d 426. The order preserves that right.

Since we have thus determined that the order of which petitioner complains was one within the discretion of the respondent, it is unnecessary to pass upon the questions relating to the writ of mandamus.

The petition for writ of mandamus is denied and the rule to show cause is discharged.

[fol. 196] Clerk's Certificate to foregoing transcript (omitted in printing).

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consolidated equitable and legal causes of action, involving a common substantial question of fact, deprive either party of a properly demanded jury trial upon that question, by proceeding to a previous disposition of the equitable cause of action and so causing the fact to become *res judicata*, unless there exist special reasons or impelling considerations for the adoption of such a pre-empting procedural course in the particular situation."

[fol. 197]

SUPREME COURT OF THE UNITED STATES  
No. 905, October Term, 1957

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF  
CERTIORARI—Dated April 8, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 8, 1958.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 8th day of April, 1958.

[fol. 198]

SUPREME COURT OF THE UNITED STATES  
No. 905, October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—May 19, 1958.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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**FILED**

**APR 8 1958**

**JOHN T. FEY, Clerk**

**IN THE**  
**Supreme Court of the United States**

**October Term 1958**

**No. \_\_\_\_\_**

**45**

**BEACON THEATRES, INC., a corporation,**

*Petitioner,*

*vs.*

**THE HON. HARRY C. WESTOVER, Judge of the United  
States District Court of the Southern District of  
California, Central Division, Fox West Coast Theatres  
Corporation, Pacific Drive-In Theatres, Inc.,**

*Respondent.*

**Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.**

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IN THE  
**Supreme Court of the United States**

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October Term, 1957.

No. \_\_\_\_\_

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BEACON THEATRES, INC., a corporation,

*Petitioner,*

*vs.*

THE HON. HARRY C. WESTOVER, Judge of the United  
States District Court of the Southern District of  
California, Central Division, Fox West Coast Theatres  
Corporation, Pacific Drive-In Theatres, Inc.,

*Respondent.*

\_\_\_\_\_  
**Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.**

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Petitioner prays that a Writ of Certiorari issue to  
review the order of the United States Court of Appeals  
for the Ninth Circuit entered in the above-entitled action  
on January 7, 1958, denying Petitioner's Application for  
a Writ of Mandamus. [R. 195.]

**Opinion Below.**

The opinion of the Court of Appeals is not yet of-  
ficially reported. It is printed in Appendix B hereto,  
*infra*, p. 8.

## Jurisdiction.

The order of the Court of Appeals was entered on January 7, 1958. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254(1).<sup>1</sup>

## The Question Presented.

In anticipation of an imminent suit for damages by petitioner, under the Clayton and Sherman Acts (Title 15 U. S. C., Secs. 1, 2, 15) wherein petitioner as plaintiff would have been entitled to a jury trial as a matter of right, the prospective defendant (Fox West Coast Theatres Corp.) filed and served a complaint for declaratory judgment. The complaint raised substantial issues common to the impending damage suit by petitioner. Subsequently, in this action, those issues were raised by petitioner in its counterclaim for damages under the anti-trust laws, 15 U. S. C., Secs. 1, 2 and 15. The trial court held, over petitioner's objection, that it would try those common issues as a part of respondent's declaratory judgment action, without a jury, before the trial of petitioner's counterclaim, although such prior trial by the court thereby would deprive petitioner of the right to try those substantial issues to the jury.

Upon petition to the Court of Appeals for the Ninth Circuit for a Writ of Mandamus, that court held that a

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<sup>1</sup>*Norwood v. Kirkpatrick*, 349 U. S. 29, 99 L. Ed. 789, 75 S. Ct. 544. See, also, *U. S. Alkali Export Assoc. v. United States* (1944), 325 U. S. 196, 89 L. Ed. 1554; *Ex parte Simmons* (1917), 247 U. S. 231, 62 L. Ed. 1094; *Ex parte Peterson* (1920), 53 U. S. 300, 64 L. Ed. 919; *Ex parte Skinner and Eddy Corp.* (1923), 265 U. S. 86, 68 L. Ed. 912; *Los Angeles Brush Mfg. Co. v. James*, 272 U. S. 701, 71 L. Ed. 481; *Ex parte Williams*, 277 U. S. 267, 72 L. Ed. 877; *McCullough v. Cosgrave* (1944), 309 U. S. 634, 84 L. Ed. 92.

Federal Court had discretion under Rule 42(b) of the Federal Rules of Civil Procedure to deprive petitioner of its right to trial by jury on those common issues because the complaint for declaratory judgment contained allegations of petitioner's prior threats that it intended to file such a damage suit and allegations of irreparable injury resulting therefrom, thus stating a claim which was equitable in nature.

The questions presented are the following:

1. May a Federal Court, under the Seventh Amendment to the Constitution, and Rule 38 of the Federal Rules of Civil Procedure, in a civil action involving joined or consolidated equitable and legal claims, which claims include common substantial questions of fact, deprive either party of a properly demanded jury trial upon that substantial question of fact by proceeding to a previous disposition of the claim denominated "equitable" and so causing that fact to become *res judicata*.

2. Where the basic issue in a complaint seeking an injunction against a threatened action at law is in essence a defense to that impending legal action, may a litigant be deprived of a jury trial on that by its prior trial by the court as a claim "in equity", or is such deprivation of jury trial forbidden by the Seventh Amendment to the Constitution and Rule 38 of the Federal Rules of Civil Procedure.

3. May a Court of Appeals hold, under the Seventh Amendment to the Constitution and Rule 57 of the Federal Rules of Civil Procedure, that substantially common issues of fact raised in a complaint for declaratory relief, otherwise triable by a

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jury, which complaint is filed in anticipation of a suit for damages, triable as of right to a jury, may be tried to the court, without a jury, over the objection of the opposite party, because the complaint also alleges threats of that damage suit and irreparable damage resulting therefrom.

### Statutes Involved.

The pertinent statutory provisions are printed in Appendix A, *infra*, page 1.

### Statement.

This action was commenced in the United States District Court for the Southern District of California by Fox West Coast Theatres Corporation, a Delaware Corporation.<sup>2</sup>

### Legal Basis for Federal Jurisdiction Alleged in Complaint.

The complaint entitled "Complaint for Declaratory Relief" alleged:

(a) That it was brought pursuant to the Federal Declaratory Judgment Act, Title 28, U. S. C. A., Sections 2201 and 2202, for the purpose of having the court declare the rights and obligations of the parties under the facts alleged in the complaint. [Complaint, R. 15.]

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<sup>2</sup>The real parties in interest are Fox West Coast Theatres Corp., hereinafter referred to as Fox West Coast, a Delaware corporation, and Pacific Drive-in Theatres, Inc., a California corporation; the respondent Hon. Harry C. Westover is Judge of the United States District Court of the Southern District of California, Central Division, who entered the orders giving rise to this petition.

(b) That the matter in controversy arose under Sections 1 and 2 of the Sherman Act, which prohibit restraints of trade and monopoly, and under the private damage provisions of the Clayton Act which provide for a remedy in damages for private persons injured. (15 U. S. C. A., Secs. 1, 2, 15.) Diversity of citizenship and the statutory amount in controversy was also alleged. [Complaint, R. 15.]

### **The Allegations in Support of the Claims for Declaratory Relief.**

The complaint alleged:

(a) That Fox West Coast and petitioner are owners of theatres in or near the City of San Bernardino, California; that Fox West Coast had for many years owned and operated the "California Theatre" in the City of San Bernardino; and that petitioner had recently constructed a drive-in theatre, the Belair Drive-in, some eleven miles away from the California Theatre. [Complaint, R. 21.]

(b) That in an action entitled *United States v. Paramount Pictures Inc., et al.*, Eq. No. 87-273 in the United States District Court for the Southern District of New York, brought by the United States against the major distributors<sup>3</sup> in the United States, for violation of the antitrust laws, there were established judicial definitions as well as judicial restrictions on the use of "clearance" in the motion picture business. Clearance in the motion

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<sup>3</sup>The distributors, as designated in the complaint in this action, included Paramount Pictures, Inc., RKO Pictures, Inc., Warner Bros. Pictures, Inc., 20th Century-Fox Film Corp., Columbia Pictures Corp., Universal Film Exchanges, Inc., Loew's, Inc., and United Artist Corp. [Complaint, R. 18.] See *United States v. Paramount Pictures, Inc. et al.*, 66 Fed. Supp. 323, 334 U. S. 131, 85 Fed. Supp. 881.



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picture business, it was alleged was defined "as the period of time usually stipulated in license contracts which must elapse between runs of the same picture within a particular area or in specified theatres." [Complaint, R. 19.]

(c) That in that action, *United States v. Paramount Pictures, Inc., et al., supra*, decrees were entered against these designated distributors in which, among other things, said distributors were enjoined

"From granting any clearance between theatres not in substantial competition.

"From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonable and necessary to protect the licensee in the run granted."

### **The Allegations of Opposing Contentions and Impending Legal Controversy.**

It was alleged:

(a) That prior to filing the complaint, the designated distributors had licensed or offered to license to Fox

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"The complaint alleged that in the *Paramount* case, the decrees provided that the court retained jurisdiction "for the purpose of requiring any of the parties to this decree, and no others, to apply to the court at any time for such orders or direction as may be necessary or proper for the construction, modification or carrying out of the same, for the enforcement or compliance whatever or for infringement for violations thereof or for other and further relief." [Complaint, R. 20.]

The complaint also alleged that in the opinion in the *Paramount* case, the court had stated that the decisions whether in any particular case unreasonable clearances have been or are being imposed and whether clearances as between theatres which are not in substantial competition to each other have been or are being imposed should be left to local suits in the area concerned. [Complaint, R. 19.]

West Coast for its California Theatre in San Bernardino, motion pictures distributed by them on *first run*, in the San Bernardino competitive area and that they had theretofore granted, after negotiation, to Fox West Coast, for said theatre, a reasonable period of *clearance* or protection before the same picture was licensed for subsequent run exhibition in said area; that the right to negotiate for first run and for clearance over subsequent exhibition was a valuable property right, the deprivation of which would result in a substantial amount of monetary damage and loss to Fox West Coast. [Complaint, R. 21.]

(b) That petitioner had recently opened its drive-in theatre eleven miles from the Fox West Coast California Theatre, but, it was alleged, within the San Bernardino "competitive area."<sup>5</sup>

(c) That "an actual controversy relating to the legal rights and liabilities of plaintiff (Fox West Coast), and defendant (petitioner) exists and arises out of the following facts." These facts, it was alleged were:

(1) That petitioner contended that its new Belair Drive-in Theatre was *not* in substantial competition with Fox West Coast's California Theatre or with other theatres in that area, and that, therefore, petitioner contended that Fox West Coast was not entitled to negotiate with the distributors for clearance in favor of the Fox West Coast Theatre over petitioner's Belair Drive-in; that petitioner contended that it was entitled, therefore, to exhibit motion

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<sup>5</sup>It was also alleged that there were other theatres within twelve miles of the Fox West Coast Theatre which were also within the San Bernardino "competitive area." [Complaint, R. 22.]

pictures at the same time, i.e., simultaneously with Fox West Coast's California Theatre in San Bernardino, eleven miles distant.

(2) That in conflict with these contentions by petitioner, Fox West Coast contended that its California Theatre in San Bernardino was substantially competitive with petitioner's newly constructed Belair Drive-in and that all other theatres in the area were mutually substantially competitive to an extent justifying the granting of clearance to one theatre over others within the purview of the opinion and findings of the special expediting court in *United States v. Paramount, et al.*; that consequently, the granting of clearance by the distributors would not be within the injunctive provisions against granting of any clearance to theatres not in substantial competition within the meaning of the consent decrees and final decrees in the *Paramount* case.

(3) That Fox West Coast contended that it had an equal right with petitioner to negotiate with each distributor independently for a prior run for its theatre in San Bernardino ahead of any other theatre, including petitioner's Belair Drive-in, and that there was no obligation on the part of any distributor in such a case to grant an equal and simultaneous run to petitioner's Belair Drive-in Theatre. [Complaint, R. 22.]

(4) That petitioner, in addition to contending that it was not in substantial competition with the other theatres, referred to by Fox West Coast, had threatened Fox West Coast and had stated to Fox West Coast in "substance and effect" that it had threatened

the distributors that "if plaintiff's (Fox West Coast) California Theatre is granted any clearance over defendant's Belair Theatre, or is granted a prior run, such action on the part of plaintiff (Fox West Coast) will be deemed by plaintiff (petitioner) to be an overt act in concert with any distributor who may grant plaintiff such clearance or prior run in restraint of trade and in violation of the Sherman Antitrust Act, and of the decrees of the Special Expediting Court in *United States v. Paramount Pictures, Inc., et al.*, and that plaintiff will be subjected to an action by petitioner for treble damages under Sec. 4 of the Clayton Act (Title 15 U. S. C. Sec. 15)." [Complaint, R. 24.]

(5) That "said" threats and duress and coercion upon the distributors arising out of and resulting from said threats of litigation threatened and had, in fact, deprived Fox West Coast of the right to negotiate for motion pictures upon first run and to negotiate for clearance over competitive theatres including petitioner's Belair Drive-in Theatre.

(6) That Fox West Coast was without any speedy or adequate remedy at law and would be irreparably harmed unless the petitioner was restrained and enjoined from instituting any action under the anti-trust laws against plaintiff (Fox West Coast) and said distributors or any of them based upon the facts alleged, during the pendency of the action, and until such time as the court should determine whether or not the plaintiff and defendant had an equal and correlative right to license a prior run with clearance on behalf of their respective theatres. [Complaint, R. 24.]

### The Prayer for Declaratory Relief.

The complaint set forth its prayer for judgment. The prayer sought a declaration that:

1. The granting of clearance between theatres on first run in the San Bernardino competitive area, and particularly between Fox West Coast's California Theatre and petitioner's Belair Drive-in Theatre "is reasonable and is not in violation of the anti-trust laws or of the decrees of *U. S. vs. Paramount*, et al."

2. That the distributors are and each of them is entitled to negotiate with Fox West Coast and petitioner and with the other owners and operators of theatres in said competitive area equally for a prior run in said competitive area.

3. That the court declare such other rights or duties as may be necessary or proper in respect to the controversy alleged.

4. That pending final decision of the court, petitioner, Beacon Theatres, Inc., be *restrained and enjoined* "from commencing any action under the anti-trust laws of the United States against plaintiff (Fox West Coast) and against the distributors arising out of the facts or controversies alleged."

The prayer then requested that the court give such other relief, equitable or otherwise, as the court deemed proper or necessary and then sought costs. [Complaint, R. 25.]<sup>6</sup>

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<sup>6</sup>Petitioner's motion to dismiss the complaint upon the grounds that said complaint was in excess of the jurisdiction of the Federal Courts because it did not show a case or controversy, as required by Article III, Sec. 2 of the Constitution of the United States, was denied on January 17, 1957. [R. 27.] Thereafter, the real party in interest, Pacific Drive-in Theatres, Inc., intervened as a defendant. [R. 29.]



No action to obtain a *pendente lite* injunction against petitioner's filing of the antitrust case was taken by Fox West Coast. Thereafter, on February 18, 1957, as anticipated by the complaint, petitioner filed its answer, affirmative defense and counterclaim, in which it sought damages under Title 15 U. S. C. 15 for damage to its business resulting from violations of the antitrust laws. Petitioner's pleading alleged:

(a) that petitioner's Belair Drive-in Theatre was not in substantial competition with any of the theatres of Fox West Coast;

(b) that Fox West Coast and Pacific Drive-in Theatres Corporation, and certain other designated corporations, were engaged in a combination conspiracy to restrain and monopolize the exhibition of motion pictures in the San Bernardino area;

(c) that said parties had agreed, pursuant to that conspiracy, to prevent Petitioner's Belair Theatre from obtaining the privilege of exhibiting motion pictures on a first-run availability, simultaneously with the exhibition of said motion pictures in the theatres of Fox West Coast, Pacific Drive-in and others;

(d) that the continued granting of clearance to Fox West Coast over Petitioner's Drive-in Theatre, and the prevention of Petitioner's Belair Theatre, from exhibiting motion pictures simultaneously with the theatres of Fox West Coast and others, was a practice carried on pursuant to and part of a conspiracy to restrain the business of Petitioner in operating the Belair Drive-in Theatre.

Petitioner, pursuant to Rule 38 of the Federal Rules of Civil Procedure, filed and served a timely demand for jury trial as to all issues of the complaint, answer and counterclaim.

On motion of Fox West Coast, and over the objection of petitioner, the respondent, on March 21, 1957, entered an order

- (a) striking Petitioner's Demand for Jury Trial as to the complaint and answer;
- (b) striking the portions of Petitioner's answer and affirmative defense relating to antitrust violations by Fox West Coast;
- (c) directing that trial be held by the court alone on all of the issues in the complaint, including the issues in the complaint which were common to Petitioner's antitrust defenses and counterclaim, and that only after such trial that Petitioner be permitted to try the remaining issues set forth in the counterclaim to a jury. [R. 64.]

After the entry of this order, Petitioner filed an original application in the Court of Appeals seeking a Writ of Mandamus directed to the respondent Judge, requiring him to enter an order dismissing the complaint as being in excess of the jurisdiction of the United States District Court or, in the alternative, to vacate the order described above and to enter an order directing respondent to proceed with the jury trial of all issues of the complaint, answer and counterclaim triable to a jury

prior to or simultaneously with the trial by the court of any issues properly triable by the court alone.<sup>7</sup>

In its petition to the Court of Appeals, Petitioner alleged the facts hereinbefore described. Petitioner alleged that respondent's order striking petitioner's demand for jury trial as to the complaint and answer, striking the antitrust defenses of petitioner's answer, and ordering a trial without jury of the complaint, before the trial of the issues in the counterclaim, unlawfully deprived petitioner of his right to jury trial under the Seventh Amendment to the Constitution of the United States, and Rules 38 and 57 of the Federal Rules of Civil Procedure of the following matters, at least, raised by the complaint:

(a) The existence of substantial competition between Petitioner's Belair Drive-in Theatre and Fox West Coast's California Theatre;

(b) The existence of unreasonable clearance between said theatres;

(c) The relative desirability of said theatres to distributors of motion pictures as outlets for first run feature motion pictures;

(d) Whether in fact requests were made by theatres for first run availability and clearance from the various motion picture distributors.

Petitioner alleged that under the principles of estoppel or *res adjudicata*, a prior determination by the trial court

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<sup>7</sup>This is the procedure approved and required by Judge Stanley Barnes, dissenting in *Institutional Drug Distributors v. Yankwich* (C. C. A. 9, 1957), 249 F. 2d 566, 571.

without a jury would bar a subsequent jury determination of these common issues, and that, therefore, a respondent's order striking its jury demand and directing the prior court trial of the common issues unlawfully deprived petitioner of its right to jury trial of its counterclaim. The Petition for Writ of Mandamus also asserted that jurisdiction of the subject matter was lacking.\*

To the order of the Court of Appeals denying the petition for Writ of Mandamus, this Petition for Certiorari is directed. The Court of Appeals for the Ninth Circuit made the following specific final decisions:

1. That in a Civil Action involving a claim which before the Federal Rules, would have been denominated a suit in equity, which claim is joined or consolidated with a claim which, before the Federal Rules, would have been denominated a claim at law, both claims including common substantial questions of fact, a Federal Court has discretion to deprive either party of a properly demanded jury trial upon that common question by proceeding to a previous disposition of the so-called equitable claim, and so causing that fact to become *res judicata*. This result, the Court held, is permitted under Federal Rules of Civil Procedure, Rule 42(b), without limitation by or consideration of the right to a jury trial under the Seventh Amendment or as guaranteed by Rule 38(a)<sup>2</sup> of the Federal Rules of Civil Procedure.

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\*In the Court of Appeals, respondent filed a response. As stated by the Court of Appeals, no issue of fact with respect to the petition of Writ of Mandamus was raised by the respondent. (Appendix B.)

2. That Rule 42(b) gives the Federal Court the right to apply this procedure of pre-emption to a complaint seeking an injunction against a threatened action at law which is in essence an attempt to assert a defense to that impending legal action.

3. The Court held that although a litigant cannot be deprived of a right to jury trial as to substantial issues by the device of a prospective defendant filing a suit for declaratory judgment raising those issues, by reason of Rule 57, and the Seventh Amendment, that result can be accomplished if the complaint for declaratory judgment adds allegations of threats of litigation and irreparable injury arising therefrom. Thereby, the Court held, the complaint for declaratory judgment is converted into an "action in equity for an injunction against threats of litigation." Thereafter, the trial court has discretion to order that equity trial first.

Having determined these questions of law adversely to petitioner, the Court of Appeals held that it did not reach the question of the issuance of the Writ of Mandamus and denied the Petition.



## Reasons for Granting the Writ.

### A.

The decision of the Court of Appeals for the Ninth Circuit in the *Beacon* case is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Leimer v. Woods*, 196 F. 2d 828, and with the only definitive decisions in the Third Circuit. See, *General Motors Corp. v. California Research Corp.* (U. S. Del., 1949), 9 F. R. D. 565, and *Ryan Distributing Corp. v. Caley* (D. C. E. D. Pa.), 51 Fed. Supp. 377.<sup>9</sup>

In *Leimer v. Woods*, 196 F. 2d 828, the Court of Appeals for the Eighth Circuit held that in an action involving joined or consolidated equitable and legal causes of action, involving a common substantial question of fact, a Federal Court could not, under the Rules of Civil Procedure and the Seventh Amendment deprive either party of a properly demanded jury trial upon that question by proceeding to a previous disposition of the equitable cause of action and so cause the fact to become *res judicata*, except for special or impelling reasons which would overcome basic constitutional procedural rights. In *General Motors Corp. v. California Research Corp.*, 9 F. R. D. 965, in an action in which the plaintiff sought a declaratory judgment and an injunction restraining the bringing or the threatening of suits at law and defendant filed a counterclaim for damages, the court held

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<sup>9</sup>The *Beacon* case, together with *Tanimura v. United States* (C. C. A. 9, 1952), 195 F. 2d 329 and the majority decision in *Institutional Drug Distributors Inc. v. Yankwich* (C. C. A. 1, 1957), 249 F. 2d 566, places the 9th Circuit in accord with the Court of Appeals for the 1st Circuit in *Orenstein v. United States* (C. C. A. 1, 1951), 191 F. 2d 184. The latter case has been more recently followed in the 1st Circuit in *Chappel & Co. v. Palerm Cafe Co.* (C. C. A. 1, 1957), 249 F. 2d 77 and *Delman v. Federal Products Corp.* (C. C. A. 1, 1958), 251 F. 2d 123.

that since the basic issues were legal issues, such basic issues formerly triable as of right by a jury were still triable by a jury as a matter of right.<sup>10</sup>

See also *Ryan Distributing Corp. v. Caley*, 51 Fed. Supp. 377.

The result of the ruling in the *Beacon* case is that the basic right to jury trial of common substantial issues is lost when equitable rights are also in the case. The ruling in the *Beacon* case holds that it is the exercise of the court's discretion under Rule 42b which controls the right of jury trial. Moreover, in the exercise of this discretion, the constitutional right to jury trial as to legal issues, is neither a controlling, nor even a relevant factor. This is in direct conflict with the decision in *Leimer v. Woods*, *supra*, with *General Motors Corp. v. Calif. Research Corp.*, *supra*, and is certainly in conflict in principle with the high place given to the right of jury trial by this court.

The construction of the Rules of Civil Procedure in the *Beacon* case conflicts with the enabling act, pursuant to which this Court promulgated, and the Congress adopted, the Rules of Civil Procedure. The Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. Sec. 723c, in granting the power to this court to prescribe rules of procedure, stated

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<sup>10</sup>This was the view of the Court of Appeals for the 9th Circuit prior to *Tanimura supra*. In *Bruckman v. Holzer* (C. C. A. 9, 1946), 152 F. 2d 730, Chief Judge Denman held that where common substantial issues are raised in claims formerly denominated legal and equitable, that the preservation of the right to jury trial, guaranteed by Rule 38A, and the Seventh Amendment, require the jury trial to be tried and determined first. This earlier opinion, cited with approval by many other circuit courts, is now disapproved by the *Beacon* decision. Professor Moore's views are in accord with the *General Motors* case, and the *Bruckman* case. (5 Moore Federal Practice (2d Ed.) pp. 148-158.)

in part, —“Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.” If the rules are constructed to give to the courts the discretion to deny jury trial where, before the Rules, there was a right to such a trial, the substantive rights of litigants are clearly abridged. (Appendix A, p. 2.)

Similarly, in this manner, there is abridgment of the express provisions in the above designated statute, —“that in such union of rules, the right of trial by jury as at common law, and declared by the Seventh Amendment, that the Constitution shall be preserved to the parties inviolate.” (Appendix A, p. 3.)

It should be noted that the Federal Rules, in many instances require all claims for relief, whether formerly denominated legal or equitable, or whether available as a claim or counterclaim, or cross-claim to be filed in the same action. The requirement is enforced by loss of the claim, if it is not tendered in the same action. In other instances, where *res judicata* principles are not applicable, the policy of the rule is expressly to encourage all claims by the diverse parties to be litigated in a single action.<sup>11</sup> But, the result of the *Beacon* decision is that if a litigant voluntarily or by compulsion files legal claims where the

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<sup>11</sup>Rule 8a permits relief in the alternative or of several different types to be demanded. Rule 12b requires *every defense* to be asserted in the responsive pleading. Rule 13a requires the pleading of any counterclaim which a party has arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. Rule 13b permits counterclaims against the opposing party without reference to the transaction or occurrence embodied in the claim. Rule 13g permits cross-claims against co-parties and rule 13h permits additional parties to be brought in. Rule 42a permits consolidation of actions although separately filed where such actions involved a common question of law or fact. (Appendix A, pp. 3-6.)

action also involves equitable claims, his right to jury trial is automatically lost. The litigant is thereafter subject to orders under Rule 42b, which are limited only by the court's discretion. Such a construction of the Federal Rules of Civil Procedure conflicts with the Enabling Statute cited *supra* and should be corrected by this Court.

It needs no demonstration to prove that important public policies are carried out through legislation which often provides for both legal and equitable remedies. As a result of the *Beacon* decision, the right to jury trial in such matters is uncertain, and the enforcement of those public policies are therefore uncertain.

As an example, the courts have long acknowledged that a litigant who seeks damages and an injunction in an antitrust case, does not waive the right to trial by jury. In *Ring v. Spina* (C. C. A. 2, 1948), 166 F. 2d 546, it was argued that the joinder of legal and equitable claims in the same action resulted in a waiver of the right to jury trial as a matter of law by analogy with the old equity rules wherein a joinder of legal and equitable claim resulted in such a waiver. The court rejected that contention. It held that this Court's opinion in *Fleitman v. Welsbach Street Lighting Co. of America*, 240 U. S. 27, 36 S. Ct. 233, 60 L. Ed. 505, established that a claim for damages under the antitrust laws is triable as of right by jury. The decision in the *Beacon* case now holds that this right to jury trial is lost; that if the court determines to try the antitrust issues under the equitable claim for an injunction first that Rule 42b provides the source of such power even though the effect is to destroy the right of jury trial which this Court in *Fleitman v. Welsbach Street Lighting Co. of America*, *supra*, acknowledged.



Legal and equitable remedies are made available jointly in many fields of public interest in addition to the field of antitrust enforcement. The ruling in the *Beacon* case makes the availability of such remedies, when they are sought in the same case, discretionary with the court through the simple device of pre-emption of trial under Rule 42b. The loss of jury trial rights in these areas of public interest, the uncertainty as to the availability of these remedies resulting from the *Beacon* decision and the conflict with the decisions of the statutes cited *supra*, requires this court's correction in this case.<sup>12</sup>

### B.

The decision in the *Beacon* case holds that substantive issues which would otherwise be tried as a defense to an imminent suit at law may be tried by the court without a jury when embodied in a suit for an injunction against threats of that action at law. The remedy at law is inadequate, the decision holds, under traditional tests (Title 28 U. S. C., Sec. 384), because the threatened suit was not filed before the complaint seeking the injunction was filed. The court holds that the subsequent filing of the legal claim as a counterclaim does not change this result because *American Life Insurance v. Stewart*, 300 U. S. 203, 57 S. Ct. 377, 81 L. Ed. 605, requires the test of the adequacy of the legal remedy to be made *only* as of the time the complaint was filed. This ruling on this technical question of adequacy of a legal remedy, it should be noted, determines the crucial result whereby, in this case, the issue of the legality of clearance, the central issue between the parties, will be tried by the court as part of

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<sup>12</sup>See Note, "Denial of Jury Trial By the Joinder of Legal and Equitable Claims," 39 Iowa L. Rev. 350.



the complaint "in equity" instead of by the jury as part of petitioner's action "at law" asserted as a counterclaim.

The court's holding in the *Beacon* case as to the test of the adequacy of a legal remedy is in direct conflict with the decisions of this court, both before and after the adoption of the Rules of Civil Procedure and is in conflict with the decision in *Prudential Insurance v. Saxe*, 134 F. 2d 16, a decision by the Court of Appeals for the District of Columbia.

It was well established by the decisions of this court prior to the adoption of the Federal Rules of Civil Procedure that when a defense could be interposed to an action at law and such an action was imminent or pending there was no occasion for equitable relief and the parties were left to their rights at law. In such a case, the bill was dismissed without prejudice, not because there was a want of jurisdiction in the Federal Court, but because the plaintiff had made no case for equitable relief.

In *Phoenix Mutual Life Insurance Co. v. Bailey* (1871), 13 Wall. 616, 80 U. S. 616, 20 L. Ed. 501, an insurer sued to cancel policies for fraud. An action at law later was begun to recover on them. This court's decision sustained dismissal of the bill, because the insurer had a complete remedy by way of defense in the action at law and the claimant on the policy had a right to trial by jury. (See also, to the same effect, *Adamos v. N. Y. Life Ins. Co.* (1935), 293 U. S. 386, 55 S. Ct. 315, 79 L. Ed. 444; *Enlow v. N. Y. Life Ins. Co.* (1935), 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440; *Cable v. U. S. Life Ins. Co.* (1903), 191 U. S. 288, 24 S. Ct. 74, 48 L. Ed. 188.)

Thus, in *Di Giorrianni v. Camden Fire Insurance Association*, 296 U. S. 64, 80 L. Ed. 47, this Court said:

"While equity may afford relief quia timet by way of cancellation of a document if there is a danger that the defense to an action at law upon it may be lost or prejudiced no such danger is apparent where, as respondent's bill affirmatively shows, the loss has occurred and suits at law on the policies are imminent and there is no showing that the defense cannot be set up and litigated as readily in a suit at law as in equity. . . . the grounds for relief for a single plaintiff which will deprive two or more defendants of their right to a jury trial must be real and substantial and its necessity must affirmatively appear (citing cases). Respondent's bill of complaint does not show that petitioners are unwilling to abide the result of a trial of one suit as controlling both;

After the adoption of the Federal Rules of Civil Procedure, this court's ruling in these cases was continued in *(Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U. S. 563, 59 S. Ct. 657, 661, 83 L. Ed. 987; N. C. Ettleson v. Metropolitan Life Ins. Co., 317 U. S. 188, 63 S. Ct. 163, 87 L. Ed. 170.)*<sup>13</sup>

The Beacon ruling is also in conflict with *Prudential Ins. Co. v. Saxe*, 134 F. 2d 16. There, the Court of Appeals for the District of Columbia, speaking through Justice Rutledge, held that under the Federal Rules of Civil Procedure, the inadequacy of a remedy at law which arises because the law action has not been filed is cured

<sup>13</sup>*American Life Insurance v. Stewart*, *supra*, on this point not *contra* since in that case there was a stipulation that the equity case be tried first. See Note *American Life Insurance Co. v. Stewart*, *supra*, 25 Georgetown Law Journal 752. See also Professor Moore's discussion of this case in 5 Moore's Practice (2d Ed.) page 155.

when, in fact, that action is filed by way of a counterclaim. The court held that to rule otherwise would be in effect to deprive the claimant of the right to jury trial, making the filing of the suits a race of diligence and do those things when the fact which renders the remedy inadequate does not exist.<sup>14</sup>

The ruling in the *Beacon* case is subject to precisely the same policy objections as was voiced by Justice Rutledge although the potential impact on the right to jury trial is even greater in the form in which it is raised in this case.

The *Beacon* case holds that standing alone alleged threats (or warnings) of an antitrust damage suit arising out of a conspiracy entitles the alleged conspirators to have a court trial on the issue of conspiracy. By parity of reasoning, alleged threats or warnings of a contract damage suit would permit a court trial on the contract issues. Similarly, threats of ordinary tort damage suits would permit a court trial of the elements of the tort claim. Easy pleading of threats or warnings of a suit at law, which warnings in our commercial society are certainly not unique, plus the preemptive procedure under Rule 42B, would thus become a far more significant determinant of jury trials than the Seventh Amendment.

But the reasoning fails and should properly be held to fail on very simple grounds. This court has since early days denied the right to abuse equitable jurisdiction.

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<sup>14</sup>The counterclaim in this action was filed in due course after the motion to dismiss was denied and the intervening defendant filed its pleading. Since the complaint requested relief *pendente lite* by way of an injunction against the filing of an antitrust case and since there was a likelihood that petitioners' claim at law would be a compulsory counterclaim here, common sense dictated that it be filed in the same case.

Chief Justice Marshall, in *Russell v. Clark Executors, et al.*, 7 Cranch 69, 89, 3 L. Ed. 271, 279, held that although bills of discovery were a basis for equitable jurisdiction "this rule cannot be abused by being employed as a mere pretext for bringing causes properly before a court of law into a court of equity." This rule has been followed by this court in many cases.

*Hipp v. Babin*, 19 How. 271, 15 L. Ed. 663;

*Scott v. Nealy*, 140 U. S. 106, 11 S. Ct. 712, 35 L. Ed. 358;

*Clark v. Roller*, 199 U. S. 541, 26 S. Ct. 141, 50 L. Ed. 300;

*Buzard v. Houston*, 119 U. S. 847, 30 L. Ed. 451.

Thus if it be true that equitable relief against a threat of an action at law is sound, it is also true that where allegations of threats of an action at law would deprive a litigant of the right of jury trial as to substantive issues, the courts hold that when the action is in fact filed the remedy at law is then adequate and the mode of trial of those issues is by jury. If thereafter injunctive relief is called for, that remedy is still available.

The ruling in the *Beacon* case should not be permitted to undermine the Seventh Amendment but should be brought into harmony by this court with the foregoing decisions in this court and other courts with which it is in direct conflict.

### C.

The decision in the *Beacon* case holds in accordance with Rule 57 of the Federal Rules of Civil Procedure and with all other courts that a declaratory judgment action against a projected legal action results in a jury

trial. This is true because in this action, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant had intended to assert as a complaint and has in fact asserted as a counterclaim. Fox West Coast, here, has sought to anticipate imminent legal action by petitioner by seeking a declaratory judgment to the effect that it would have a good defense when that cause of action was asserted. Where the complaint in an action for declaratory relief seeks in essence to assert a defense to an impending or threatened complaint at law, it is the character of the threatened complaint at law, and not of the defense, which will determine the right to jury trial.

5 Moore's Federal Practice (2nd Ed.) p. 213.

The Court of Appeals for the 9th Circuit has held that in a declaratory relief suit against a projected legal action "the entire case must be submitted to a jury." (*Pacific Indemnity v. McDonald* (C. C. A. 9, 1938), 107 F. 2d 446.) In support thereof, see also *Hargrove v. American Cent. Ins. Co.* (C. C. A. 10, 1942), 125 F. 2d 225; *United States Federal & Guaranty Co. v. Koch* (C. C. A. 3, 1939), 102 F. 2d 288; *Aetna Cas. Co. v. Quarles* (C. C. A. 4, 1937), 92 F. 2d 321.

But the *Beacon* decision also holds that in a declaratory relief action if the complaint alleges *per se* that the declaratory defendant threatened an action at law and further alleges irreparable injury from those threats, the declaratory relief action is thereby converted into an action which prior to the Federal Rules would have been denominated an "action in equity." This hold-



ing is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Leach v. Ross Heating & Mfg. Co.* (C. C. A. 2, 1931), 104 F. 2d 88. There the court of appeals held that in a suit for an injunction against patent infringement, a counterclaim which sought a declaration of patent invalidity, and also alleged threats of litigation by the patentee, resulting in damage, stated a counterclaim for declaratory judgment only. Judge Learned Hand expressly pointed out that the counterclaim could not be considered as anything more than a declaratory judgment suit, although it asked for an injunction against threats to defendant's customers. Judge Hand said "such threats give rise to a cause of action only in case the party who makes them refuses to test his right in court."<sup>15</sup> (See *Asbestos Shingle, Slate & Sheathing Co. v. H. W. Johns-Manville Co.*, 189 Fed. 611, opinion by Judge L. Hand.)

Thus it is that the *Beacon* decision, following the prior decision of the Court of Appeals for the 9th Circuit in *MGM v. Fear*, 104 F. 2d 892, is in direct conflict with *Leach v. Ross Heating and Mfg. Co.* and with the following decisions:

*Bechick Products v. Flexible Products* (C. C. A. 2, 1955), 225 F. 2d 603;

*Kaplan v. Helenhart Novelty Corp.* (C. C. A. 2, 1955), 182 F. 2d 314;

*Zephyr American Corp. v. Bates Mfg. Co.* (C. C. A. 3, 1941), 128 F. 2d 380;

*Johnson Laboratories Inc. v. Meissner Mfg. Co.* (C. C. A. 7), 98 F. 2d 937.

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<sup>15</sup>This language is part of the dissenting opinion but on this issue there was no disagreement by the court.

See:

*Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8, 37-38, 33 S. Ct. 202, 208, 57 L. Ed. 393;  
98 A. L. R. 671.

These latter decisions all hold that bare allegations of threats of a suit at law without allegations of a refusal to test the right asserted in court, or other allegations of malice or bad faith, do not state an independent claim in equity.

Moreover, the presence in a claim for declaratory judgment of allegations of threats to sue are precisely for the purpose of establishing an actual existing legal controversy which is a requirement of a declaratory judgment suit in the Federal Court by reason of Article III, Section 2 of the Constitution of the United States.

*Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U. S. 270, 85 L. Ed. 826;

*Dewey and Almy-Chemical Co. v. American Anode* (C. C. A. 3, 1943), 137 F. 2d 68;

*Arlac v. Hat Corporation of America* (C. C. A. 3, 1948), 166 F. 2d 286);

*Brisk Water Proofing Co. v. Belanger & Sons* (C. C. A. 1. 1954), 209 F. 2d 169.

In the instant case, for example, there was no contractual or other business relationship between petitioner and Fox West Coast. Their mere disagreement as to legality of clearance and substantial competition would constitute a dispute but not a legal controversy. Immediate impact of these disagreements by way of threatened litigation, as alleged, therefore was pleaded to support the crucial element under Article III, Section 2 of the Constitution.

Thus, the complaint was only for declaratory judgment and the holding that it was "in equity" is in direct conflict with the foregoing designated decisions.

Rule 57 of the Federal Rules of Civil Procedure was intended to guarantee that the procedural device of declaratory judgments should not destroy the right of jury trial. To hold that allegations of threatened action at law *per se* create a cause of action which would be denominated in equity would provide a too easy mechanism for subverting the obvious policy of the rules which is to protect the right to jury trial in declaratory judgment actions.

D.

This court has often granted certiorari to consider questions of importance in the administration of the lower Federal courts, particularly in those cases where if the matter is to be promptly settled at all it must be settled by this court. Thus, in *Norwood v. Kirkpatrick*, 349 U. S. 29, 99 L. Ed. 789, 75 S. Ct. 544, the Court of Appeals for the Third Circuit had denied an application for mandamus or prohibition to a district Judge to require him to set aside orders transferring a cause under 28 U. S. C. 1404A. This court granted writ of certiorari to review that denial of an application for mandamus. In the instant case, as in *Norwood v. Kirkpatrick*, *supra*, there are presented important issues in the administration of the trial courts. Every day the trial courts are presented with the question of the determination as to the mode of trial, jury or non-jury, in civil actions. By reason of the encouragement and requirements of the Rules of Civil Procedure, joined or consolidated legal and equitable claims are often presented;

so too are claims under the Declaratory Judgment Act. (Title 28, Secs. 2201, 2202, Appendix A, *supra*, p. 2). The employment of improper standards for determining the relationship between the right of litigants to jury trial and the right of the Federal courts to determine the order of trial in such cases can play havoc with the orderly administration of justice.

The order of the respondent Judge, affirmed by the Court of Appeals in the *Beacon* decision, with complete finality, deprived petitioner of a jury trial as to basic, fundamental factual issues in the complaint and in petitioner's counterclaim for damages for violations of the antitrust laws. Wrongful deprivation of jury trial, standing alone, has long been held by this court to provide sufficient foundation for the issuance from this court even of common law Writs of Certiorari, as well as Mandamus, under 28 U. S. C. 1651 (the All-Writs Statute). (*United States Alkali Export Assoc. v. United States* (1944), 325 U. S. 196, 89 L. Ed. 1554 (Writ of Certiorari); *Ex parte Simmons* (1917), 247 U. S. 231, 62 L. Ed. 1094 (Mandamus); *Ex parte Peterson*, (1920), 253 U. S. 300, 64 L. Ed. 919 (Mandamus); *Ex parte Skinner and Eddy Corp.* (1923), 265 U. S. 86, 68 L. Ed. 912 (Mandamus).) Extraordinary writs were issued out of this court to compel a trial court to vacate its reference of patent suits to a Master. (*McCullough v. Cosgrave* (1944), 309 U. S. 634, 84 L. Ed. 992; *Los Angeles Brush Mfg. Co. v. James*, 272 U. S. 701, 71 L. Ed. 481.) Similarly, this court directed trial by a 3-judge Court in lieu of trial before a single judge by Mandamus. (*Ex parte Williams*, 277 U. S. 267, 72 L. Ed. 877; *Ex parte Collins*, 277 U. S. 565, 72 L. Ed. 990.)

This Court has held that the proper administration of the working rules of the Federal Courts are its primary responsibility. (*La Buy v. Howes Letter Co., Inc.*, 352 U. S. 249.)

The procedural rules embodied in the Federal Rules of Civil Procedure and the Declaratory Judgment Act are of course "substantive" in the most practical meaning of that term. As they affect the right to jury trial these rules become implements for the protection or the destruction of rights guaranteed by the Constitution. The instant decision is destructive of substantive Constitutional rights, is in conflict in fact and in principle with the decisions of this Court and other Courts of Appeal as argued herein, and should therefore be reviewed and reversed by this Court.

### Conclusion.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX A.

### Statutes.

28 U. S. C. 1254(1).

Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon Petition of any party to any civil or criminal case before or after rendition of judgment or decree.

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### CONSTITUTION OF THE UNITED STATES -- SEVENTH AMENDMENT.

In Suits at common law, where the value in controversy shall exceed twenty dollars; the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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### ACT OF JUNE 19, 1934, 48 STAT. 1064, 28 U. S. C. SECTIONS 723, 723c.

"Be it enacted . . . that the Supreme Court of the United States shall have the power to prescribe, by general rules for the District Courts of the United States, and for the Courts for the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedures in civil actions at law. Said rules shall neither abridge, enlarge nor modify the substantive rights of a litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2. The Court may at any time unite the general rules prescribed for it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: provided, however, that in such union of rules the right of trial by jury as a common law and declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

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FEDERAL RULES OF CIVIL PROCEDURE—USCA 28, SECS  
2201 and 2202.

SECTION 2201.

In a case of actual controversy within its jurisdiction except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

SECTION 2202.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

FEDERAL RULES OF CIVIL PROCEDURE 8a—U. S. C. 28.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless this court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

FEDERAL RULES OF CIVIL PROCEDURE 12b—U. S. C. 28.

Every defense, in law or fact, to a claim for relief in an pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may

assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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FEDERAL RULES OF CIVIL PROCEDURE 13a—U. S. C. 28

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

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FEDERAL RULES OF CIVIL PROCEDURE 13b—USC 28.

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.



FEDERAL RULES OF CIVIL PROCEDURE 13g—USC 28.

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

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FEDERAL RULES OF CIVIL PROCEDURE 13h—USC 28.

When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

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28 U. S. C. FEDERAL RULES OF CIVIL PROCEDURE—Rule 38(a).

The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

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FEDERAL RULES OF CIVIL PROCEDURE—USCA 28, RULE  
42a. and 42b.

42(a) When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

42(b) The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

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28 U. S. C. FEDERAL RULES OF CIVIL PROCEDURE—  
RULE 57.

The procedure for obtaining a declaratory judgment pursuant to Title 28, U. S. C. Par. 2201, shall be in accordance with these rules, and the right of trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

## APPENDIX "B".

### Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Beacon Theatres, Inc., a corporation, Petitioner, vs.  
The Hon. Harry C. Westover, Judge of the United States  
District Court, of the Southern District of California,  
Central Division, Respondent. No. 15,614.

Jan. 7, 1958.

#### ON PETITION FOR WRIT OF MANDAMUS.

BEFORE: HEALY, POPE and CHAMBERS, Circuit Judges.  
POPE, Circuit Judge.

This is an original application by Beacon Theatres, Inc., seeking a writ of mandamus directed to the respondent Judge requiring him to take action to vacate certain orders made by him which petitioner asserts will operate to deprive petitioner of its right to trial by jury of certain issues presented by the pleadings in a case still pending in the respondent's court.

The petition for the writ and the response disclose that the parties to the pending litigation, Fox West Coast Theatres Corporation, plaintiff, and Beacon Theatres, Inc., defendant, are owners of theatres in or near the City of San Bernardino, California. The plaintiff, here called Fox, a Delaware corporation, owns the "California Theatre". The defendant, here called Beacon, a California corporation, is owner or lessee of the "Bel-Air Drive-In Theatre" situated some 11 miles distant from Fox's theatre. On October 31, 1956, Fox filed in the respondent's court a complaint against Beacon which was entitled

"Complaint for Declaratory Relief". The complaint alleged the requisite amount in controversy and both diversity of citizenship of the parties and that the controversy arose under the laws of the United States, (the Sherman and the Clayton Acts). It stated that heretofore the plaintiff had received license from the major distributors of motion pictures in the United States, namely, Paramount Pictures, Inc., RKO Radio Pictures, Inc., Warner Brothers Pictures, Inc., Twentieth Century-Fox Film Corporation, Columbia Pictures Corporation, Universal Films Exchanges, Inc., Leow's Incorporated, and United Artists Corporation, whereby Fox had been given the right to first-run exhibition of motion pictures in the "San Bernardino competitive area", with reasonable periods of clearance or protection prior to subsequent run or exhibition in that area. Quoting: "That the right so [to] negotiate with the Distributors for first-run exhibition of motion pictures in said San Bernardino competitive area and to negotiate for a reasonable period of clearance or priority of run over subsequent exhibitions of the same motion picture in said area are and each of them is a valuable property right of plaintiff and of plaintiff's said California Theatre, the deprivation of which would result in substantial monetary damage and loss to plaintiff." It continues that defendant Beacon had recently constructed a drive-in theatre with a capacity for approximately 1000 automobiles; that the theatre was within the San Bernardino competitive area; and that the average driving time between plaintiff's and defendant's theatres was not more than 20 minutes; that the plaintiff's California Theatre was substantially competitive with defendant's Bell-Air Drive-In Theatre; that there were other theatres in that area substantially competitive with those

of plaintiff and defendant and that in consequence any one theatre may validly be granted clearance over all the others within the purview of the opinion and findings of a Special Expediting Court in the case of United States of America, plaintiff, v. Paramount Pictures, Inc., et al., defendants; Equity No. 87-273, rendered in the United States District Court for the Southern District of New York and entered on February 8, 1950;<sup>1</sup> Paragraphs XI and XII are as follows:

"XI. An actual controversy relating to the legal rights and liabilities of plaintiff and defendant exists and arises out of the following facts: Defendant contends that its theatre is not in substantial competition with plaintiff's California Theatre, or with other theatres located in the San Bernardino competitive area, and that it is entitled to exhibit motion pictures distributed by the above named Distributors day and date, that is to say simultaneously, with their first-run exhibition in the San Bernardino

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<sup>1</sup>The complaint quotes the following definitions from the opinion in that case as follows: "Runs—The successive exhibition of a motion picture in a given area, first run being the first exhibition in that area, second run being the next subsequent and so on.

"Clearance—The period of time, usually stipulated in license contracts, which must elapse between runs of the same picture within a particular area or in specified theatres."

From the findings in that case the complaint quotes the following: "76. Either a license for successive dates, or one providing for clearance, permits the public to see the picture in a later exhibiting theatre at lower than prior rates.

"77. A grant of clearance, when not accompanied by a fixing of minimum admission prices or not unduly extended as to area or duration affords a fair protection of the interest of the licensee in the run granted without unreasonably interfering with the interest of the public.

"78. Clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures. The practice is of proved utility in the motion picture industry and necessary for the reasonable conduct of the business."



competitive area, and that neither the plaintiff nor the other owners and operators of theatres within said area are entitled to negotiate with said Distributors for any clearance over defendant's Bel-Air Drive-In Theatre.

"Plaintiff contends that its California Theatre is substantially competitive with defendant's Bel-Air Drive-In Theatre on first-run in said area, and that the other said theatres in the San Bernardino area are each of them substantially competitive with each other, to an extent justifying the granting of clearance to one theatre over others within the purview of the opinion and findings of the Special Expediting Court in *United States v. Paramount Pictures, Inc., et al.*, above referred to, and that the granting of clearance by the Distributors would not be within the injunctive provisions against the granting of any clearance to theatres not in substantial competition within the meaning of the consent decrees and final decrees in said action above referred to.

"Plaintiff further contends that it has an equal right with the defendant to negotiate with each Distributor independently for a prior run for plaintiff's California Theatre ahead of any other theatre, including defendant's Bel-Air Drive-In Theatre, in said competitive area and that there is no obligation on the part of any Distributor in such a case to grant an equal and simultaneous run to defendant's said Bel-Air Drive-In Theatre.

"XII. The defendant, in addition to contending that its said Bel-Air Drive-In Theatre is not substantially competitive with any other theatre in the San Bernardino area on first-run exhibition in said area, has threatened plaintiff and has stated to plaintiff in substance and effect that it has threatened the Distributors above mentioned that if plaintiff's said California Theatre is granted any

clearance over defendant's Bel-Air Drive-In Theatre, or is granted a prior run, said action on the part of plaintiff will be deemed by defendant to be an overt act in concert with any distributor who may grant plaintiff such clearance or such priority of run in restraint of trade and a violation of the Sherman Antitrust Act and of the decrees of the Special Expediting Court in United States v. Paramount Pictures, Inc., et al., and that plaintiff will be subjected to an action by said defendant for treble damages under Section 4 of the Clayton Act (Title 15 USC Section 15). That said threats and the duress and coercion upon the Distributors arising out of and resulting from said threats of litigation threaten to and have in fact deprived plaintiff and its said California Theatre of the right to negotiate for motion pictures upon their first-run in the San Bernardino area and to negotiate for clearance over theatres in competition with plaintiff's said theatre upon said first-run, including defendant's Bel-Air Drive-In Theatre. That plaintiff is without any speedy or adequate remedy at law and will be irreparably harmed unless defendant and its officers, agents and employees, are restrained and enjoined from instituting any action under the anti-trust laws against plaintiff and said Distributors, or any of them, based upon the facts hereinabove alleged during the pendency of this action and until such time as the court shall determine whether or not the plaintiff and defendant have an equal and correlative right to license a prior run with clearance on behalf of their respective theatres."

The prayer was for an adjudication that a grant of clearance between these theatres on first run was reasonable and not a violation of the anti-trust laws; and that the distributors mentioned were entitled to negotiate with

Fox and Beacon and other theatre owners equally for prior runs in that competitive area; that pending final decision Beacon be restrained and enjoined from commencing any action under the anti-trust laws against Fox and against the distributors, and that the court grant such further relief, equitable or otherwise, as it deemed proper or necessary in the premises.

Thereafter Beacon filed its "Answer, Counter-Claim and Cross-Claim and Demand for Jury Trial", in which it put in issue the allegations of the complaint.<sup>3</sup> The counterclaim and crossclaim contained extensive allegations asserting that the plaintiff and certain other owners of local theatres at or near San Bernardino, together with the above mentioned distributors, entered into an agreement, combination or conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act and a continuing combination and conspiracy to monopolize trade and commerce in violation of Section 2 of that Act. Beacon asked judgment in its favor on the cause of action asserted in plaintiff's complaint. It prayed for judgment against Fox (and against another local theatre owner which had intervened on the side of Fox) for three-fold damages in the sum of \$300,000, and for injunction against continuation of the alleged conspiracy. Jury trial was demanded "with respect to the complaint, answer, counterclaim and cross-claim."

Asserting that defendant Beacon was not entitled to have the issue presented by the complaint tried to a jury,

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<sup>3</sup>By way of further answer and affirmative defense Beacon alleged the making of an agreement and conspiracy in restraint of trade and to monopolize trade and commerce in violation of the Sherman Act, which was also set forth in defendant's counterclaim. This portion of the answer was stricken on motion.

Fox moved to strike the demand for jury trial on the complaint and the answer thereto. The respondent Judge granted the motion and ordered the issues presented by the plaintiff's complaint to be tried to the court without a jury; he also granted the plaintiff's further motion for a separation of the issues raised by the complaint and the answer thereto from the anti-trust issues raised by the defendant's counterclaim and cross-claim,<sup>3</sup> and ordered the issues under the complaint and the answers thereto to be tried to the court without a jury in advance of and separately from defendant's counterclaim and cross-claim for damages under the anti-trust laws.

Thereupon Beacon, after procuring leave from this court filed the petition now before us praying for a writ of mandamus requiring the respondent to vacate his order striking the demand for jury trial as to the complaint and answer and the order setting for trial the issues of the complaint prior to the trial of the counterclaim, and that respondent be directed to proceed with a jury trial of all issues of the complaint, answer and counterclaim susceptible of such mode of trial. The petition sets forth the history of the proceedings in the respondent court as above outlined and no issue of fact in respect thereto is raised by the response.

Beacon asserts that the orders of the respondent above mentioned which petitioner seeks to have vacated and cancelled, will operate to deprive petitioner of its right to a jury trial, and that if the respondent proceeds, as he proposes to do, the jurisdiction of this court and its opportunity to hear an appeal from any final judgment in

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<sup>3</sup>As noted above, the answer set forth as a "further answer" and as an "affirmative defense" the same conspiracy alleged in the counterclaim. This order also struck these portions of the answer.

the case would be frustrated in that the whole trial without a jury would go for naught and the whole case would have to be tried again. Under these circumstances, Beacon says, the extraordinary writ of mandamus in this court is the appropriate remedy, citing in support of that position *Ex Parte Simons*, 247 U.S. 231; *Ex Parte Peterson*, 253 U.S. 300; *Ex Parte Skinner & Eddy Corp.*, 265 U.S. 86; and *U.S. Alkali Assn. v. United States*, 325 U.S. 196.\*

The primary question to be determined by us is whether petitioner is correct in its claim that it was the duty of the respondent to proceed in such manner as to afford petitioner a jury trial upon all the issues presented by its counterclaim. It will be noted that if matters proceed in the respondent's court in the manner now directed, the court, sitting without a jury, will first try the issues raised by the complaint of Fox and the answer of Beacon thereto, including the issues between the parties as to whether Beacon's theatre is in substantial competition with Fox's California Theatre or with other theatres located in the San Bernardino area.

Beacon's position is that the real controversy between the parties is whether it is entitled to recover from Fox damages for the latter's alleged violation of the anti-trust laws. It says that by filing its suit for declaratory relief Fox has merely anticipated this suit for damages in which it was a prospective defendant and in which a right to trial by jury would exist; that if a court may do

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\*Petitioner also cites to the same effect: *Bereslavsky v. Caffey*, 2 cir., 161 F. 2d 499; *Bereslavsky v. Kloeb*, 6 cir., 162 F. 2d 862; *Canister Co. v. Leahy*, 3 cir., 191 F. 2d 255; it contends that its position is sustained by the reasoning in *La Buy v. Howes Leather Co.*, 352 U. S. 249.



what respondent has done here, then any time a prospective defendant anticipate that he is about to be sued in an action at law he could avoid a trial by jury by first filing a complaint for declaratory relief and thus deny a prospective plaintiff the jury trial which the latter is entitled to have under the Seventh Amendment. Petitioner relies principally upon this court's decisions in *Pacific Indemnity v. McDonald*, 107 F. 2d 446, and *Dickinson v. General Accident F. & L. Assur. Corp.*, 147 F. 2d 396.

In the *McDonald* case, an insurance company sought a declaratory judgment as to its liability on an automobile insurance policy, alleging that it was relieved of liability on the policy because of the insured's refusal to cooperate as required by the policy, through fraudulent collusion with the injured party. The trial court tried the question of collusion without a jury and ordered the other issues raised by the complaint to be tried by a jury. The judge made findings against the insurance company upon the issue which it tried, and there was verdict and judgment for the defendants. Plaintiff appealed contending that the entire case should have been tried by the court without a jury. This court held that the entire case should have been submitted to the jury, saying: "It follows from what we have said that we simply have a situation herein where a party who has issued a policy of insurance anticipates a suit thereon by the insured or one subrogated to his rights and to avoid delay brings the matter before the court by petition for declaratory relief. In such a proceeding, although the parties are reversed in their position before the court, that is, the defendant has become the plaintiff and vice versa, the issues are ones which in the absence of the statute for declaratory relief would be tried at law by a court and jury. In such a

case, we hold that there is an absolute right to a jury trial unless a jury has been waived." (p. 448)

The Dickinson case was also an action by an insurance company seeking declaration of non-liability on an automobile insurance policy. The defendants sought affirmative relief and a money judgment. Their demand for a jury trial was granted but the verdicts returned for them were treated by the trial court as advisory only and the court rejected them and made its own findings for the plaintiff insurance company. This court reversed, citing its decision in the McDonald case, and holding that the right to a jury trial of such factual issues ordinarily triable to a jury was expressly preserved by the declaratory judgment statute.

Asserting that the facts here are substantially the same as those in the McDonald and Dickinson cases, petitioner says: "Fox West Coast has elected to escape from the role of defendant and become a plaintiff for the express purpose of avoiding the inevitable trial by jury of a suit for damages under the Sherman Act." If this case were as simple as the McDonald and Dickinson cases, its decision would present few difficulties. Rule 57, Rules of Civil Procedure, relating to the procedure for obtaining a declaratory judgment preserves the right to trial by jury in cases of that character.<sup>5</sup> But the case presented here, as we see it, is more difficult.

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<sup>5</sup>"Rule 57. Declaratory Judgments—The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

The complaint which was filed in the respondent's court seeking declaratory judgment contains not merely the allegations of the circumstances of the actual controversy between the parties with respect to whether their theatres are substantially competitive with each other, and as to whether the plaintiff Fox could properly negotiate for prior runs and clearances within the meaning of the Paramount Pictures decree; in addition it contains allegations which Fox says show that it is entitled to equitable relief against threatened conduct on the part of Beacon which, unless enjoined, will operate seriously to interfere with the operation of Fox's California Theatre and cause Fox irreparable injury and damage for which it has no adequate remedy at law. In other words, Fox contends that its complaint in respondent's court sets forth grounds entitling it to relief in equity and that its complaint is more than a mere application for declaratory relief.

It seems obvious that if this contention be correct, and if the case presented by the complaint falls within the category of a recognized and traditional suit in equity, then we have a problem here which was not presented in either the McDonald or the Dickinson cases. The question is, if plaintiff files a suit in equity against the defendant, and defendant responds with a cross-action at law against the plaintiff, and if some issues are common to both the suit in equity and the action at law, is it the duty of the trial judge to try both cases simultaneously or to try the action at law first, or is it within the discretion of the judge to try the equity suit first? If it be assumed that ordinarily the trial judge has such discretion, is that discretion qualified or modified under circumstances shown to exist in this particular case? In an effort to deal with these questions we proceed first to inquire whether Fox's

original complaint did set forth grounds for the exercise of equitable jurisdiction.

The allegations which are relied upon as stating a basis of equitable relief by way of injunction are set forth in paragraph XII of the complaint and have been quoted above. There it is alleged that Beacon has threatened Fox and has threatened the named distributors of films that if Fox's California Theatre is granted any clearance over Beacon's theatre or granted a prior run, defendant will treat that as an overt act on the part of the distributor and the plaintiffs in restraint of trade and in violation of the Sherman anti-trust act; and that in that event defendant will sue for treble damages under the Clayton Act. It is further alleged in substance that these threats amount to duress and coercion upon the distributors which operate to deprive the plaintiff of its right to negotiate for motion pictures upon their first run in the area and to negotiate for clearance over competing theatres, including defendant's theatre; that plaintiff is without any speedy or adequate remedy at law and will be irreparably harmed unless defendant be restrained and enjoined from continuing these threats and from instituting any action under the anti-trust laws against plaintiff and the distributors.\*

It is well settled that where a defendant engages in conduct or threatens to engage in conduct calculated to

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\*It may be that the portion of the pleading here referred to is not a model of pleading. Thus, it refers to plaintiff's demand that defendant be "restrained and enjoined from instituting any action under the anti-trust laws." It seems plain from the allegations generally, and from the prayer for general equitable relief that plaintiff was seeking an injunction not merely against the institution of an anti-trust suit but against the threats, duress and coercion upon the distributors.

violate or interfere with a plaintiff's right of property or of contract, equity will enjoin that conduct in any case in which it appears that the plaintiff is without an adequate remedy at law. Cf. Pomeroy's Equity Jurisprudence, 5th Ed., Sec. 1338. And this is true although the property or contract or other similar rights which plaintiff seeks to protect may be said to be legal rights. Furthermore, it is also clear that the rights which are entitled to protection of this kind, fall within a very broad definition of property or contract rights;—they include within the category of property rights "any civil right of a pecuniary nature." *International News Serv. v. Asso. Press*, 248 U.S. 215, 236.<sup>1</sup> This right to protection by way of injunction against interference with property or contracts or other pecuniary rights, has been applied so as to protect a person in his right to earn a livelihood and to continue in employment unmolested by efforts to enforce void state statutes. *Truax v. Raich*, 239 U.S. 33.

Recently this court applied the same rule in the protection of the right of merchant seamen to seek prospective employment in order to earn a livelihood. It stated that such right "was one entitled to protection at the hands of a court of equity. . . . The right of action

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We read the allegations in the light of the rules for construing pleadings laid down in *Conley v. Gibson*, ..... U. S. ...., decided November 18, 1957. The same rule requires us to disregard the fact that plaintiff alleged that defendant "has stated to plaintiff in substance and effect that it has threatened the distributors", instead of alleging in so many words that defendant has threatened the distributors.

"In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right (cases cited); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired."



here would appear to be founded upon the same equitable principles declared in the *Truax* case." *Parker v. Lester*, 227 F. 2d 708, 713. In *Metro-Goldwyn-Mayer Corp. v. Fear*, 9 cir., 104 F. 2d 892, 899, this court held that a plaintiff was entitled to injunctive relief against intentional and wrongful acts operating to interfere with the plaintiff's probable expectancy of having its customers continue to deal with it. In that case, the appellee, holder of a patent covering a film developing machine, the use of which had been licensed to plaintiff, and which plaintiff used in developing film procured from its customers, sent letters to the plaintiff's customers threatening to sue them for infringement. This court held that the sending of these letters was improper; that there was a reasonable probability that damages would result from such conduct, and "under such circumstances, the appellant was entitled to an injunction." In so holding it is plain that this court recognized that a reasonably probable expectancy of economic advantage from prospective dealings with others, is in the nature of a property right entitled to protection through the issuance of an injunction in equity whenever it appears that there is not a complete and adequate remedy at law. "A large part of what is most valuable in modern life seems to depend more or less directly upon 'probable expectancy.'" *Jersey City Printing Co. v. Cassidy*, 63 N.J. Eq. 759, 765, 53 Atl. 230.\*

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\*This case is cited with other cases dealing with "precontractual interferences" in *Harper & James, "The Law of Torts,"* §6.11. Included is the celebrated case of *Keeble v. Hickeringill*, 11 East 574, 103 Eng. Rep. 1127 (1707), where defendant was charged with the deliberate discharge of firearms for the purpose of frightening wild ducks away from plaintiff's pond on which plaintiff had placed decoys. The authors said: "Here again, as in the case of inducing breach of contract, the principle is that intentional interference with another's efforts to enter into profitable contractual relations is actionable unless it falls within the area of socially acceptable conduct which the law regards as privileged."

In *Berrien v. Pollitzer*, (D.C. cir.) 165 F. 2d 21, the court held that this right to protection by injunction even extended to a plaintiff's right not to be excluded from a political party's headquarters. The court points out that injunctions and similar equitable remedies are available for protection of rights which are not strictly property in the more limited sense of that term. The court quoted with approval the statement of the Supreme Judicial Court of Massachusetts: "We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions by which it will protect property rights by injunction."

Turning then to the complaint in this case, it is there manifest that Fox seeks protection for its "right to negotiate for motion pictures upon their first-run in the San Bernardino area and to negotiate for clearance over theatres in competition with plaintiff's said theatre upon said first-run including defendant's Bel-Air theatre." The authorities which we have cited disclose that a right so to negotiate, sufficiently partakes of the nature of a property right or sufficiently resembles a property right as to be entitled to protection through the use of the injunctive process against intentional and wrongful acts calculated to destroy it, provided only that there is not a complete or adequate remedy at law.

It has long been recognized that a person having an existing contract for the acquisition of property or services or other things of value may have equitable relief by way of injunction against a third person who with knowledge of the contract performs acts designed to induce the breach of the plaintiff's contract. All that need be proven in such cases is that the attempted interference by the third person with plaintiff's contract and his attempts

to induce the other party to the contract to breach it is done intentionally. *Meyer v. Washington Times Co.*, (C.A.D.C.) 76 F. 2d 988, 992. In the present case, it is not asserted that defendant is attempting to bring about a breach of presently existing contracts between the plaintiff and the distributors. As we have noted, the alleged threats and duress are designed to deprive plaintiff of its opportunity to negotiate for future contracts. The cases previously cited sufficiently show plaintiff's right thus to negotiate for contracts as a part of its normal method of doing business is as much entitled to protection as any property or contract right in the more traditional sense. This was recognized long ago by this court in *Sailors Union of the Pacific v. Hammond Lumber Co.*, 156 F. 450, where we held that a plaintiff was entitled to an injunction to protect it in this right to contract to employ labor.

The same rationale supports the decisions upholding the issuance of injunctions to protect against unfair competition in which of course the anticipated damage to the plaintiff arises from his inability to conclude new contracts with prospective customers because of the wrongful acts of the defendant. The same reasoning supports the numerous decisions to the effect that the liability of a third person for procuring a breach of contract on the part of another is in no manner altered by the fact that the contract in question is one terminable at will.\*

It sufficiently appears here that threats addressed to the distributors threatening suit or prosecution under the anti-trust acts would be calculated to make it impossible

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\*See the numerous cases collected in a note at 84 A. L. R. pp. 60 to 63.

for plaintiff to negotiate for or procure such first-run pictures or clearance from the distributors. The acts of the defendant Beacon which are here complained of are not different from the threatening letters of the defendant in Metro-Goldwyn-Mayer Corp. v. Fear, supra, with respect to which this court held the plaintiff was entitled to an injunction. It is also plain that so far as an action by the plaintiff is concerned, it has available to it no adequate remedy at law. As this case reaches us we must assume that the plaintiff is in a position to prove and establish the facts alleged in its complaint. If those facts be true, then plaintiff was likely to be obliged to operate its California Theatre without the advantage of first-runs or clearances, for some if not all of the distributors were likely to be deterred from so dealing with plaintiff because of Beacon's threats. Such threats carry with them the implication that the distributors also may have to defend tremble damage suits. At any rate, just how much effect these allegedly wrongful acts of the defendant will have, and how much the damages will amount to are not susceptible to ready ascertainment. As this court said in Sailors' Union of the Pacific v. Hammond Lumber Co., supra, (p. 455) "One ground of equitable jurisdiction in cases of continuing trespass is the fact that the measure of damages is exceedingly difficult of ascertainment. And relief by injunction may be invoked as a remedy for the destruction of one's business, if in such a case no action at law would afford as complete, prompt and efficient a remedy."

This brings us to the question whether as the case now stands in the respondent's court, Fox may be said to have an adequate remedy at law through its opportunity to defend the counter action brought against it by Beacon.



We think that the question whether the plaintiff stated a claim properly triable before the court sitting in equity must be judged as of the time when the complaint was filed. At that time, October 31, 1956, the defendant had brought no suit; all that plaintiff was confronted with at that time were the threats and duress directed to it and to the distributors. The counterclaim was not filed until February 18, 1957. Obviously prior to the time when it filed its complaint plaintiff was not in a position to compel the bringing of an action by the defendant at any stated time. Consistently with the allegations of the complaint defendant, unless enjoined, could go on indefinitely threatening the distributors and the plaintiff with future suits; and as long as the threats worked, defendant would have its way and the business of the plaintiff would be seriously limited. We think that we must accept what was said in a somewhat comparable case of *Amer. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215, "The argument is made that the suits in equity should have been dismissed when it appeared upon the trial that after the filing of the bills, and in October, 1932, the beneficiaries of the policies had sued on them at law. But the settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter."<sup>10</sup>

In directing that the issues raised by the complaint be tried separately from defendant's counterclaim and cross-

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<sup>10</sup>We assume that if Beacon's action for treble damages was actually filed and pending on the date when plaintiff filed its complaint, that plaintiff might have had an adequate remedy at law by interposing its defense to Beacon's action. While we make that assumption for the purpose of this case, it is not altogether certain that such defense would furnish an adequate remedy. Thus throughout the period that the treble damage suit was pending,



claim for treble damages, the respondent purported to act under the authority of Rule 42(b) Rules of Civil Procedure: "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." The question is whether, notwithstanding that provision, some other rule or requirement relating to the right to trial by jury prohibited the respondent from directing that the issues raised by the complaint be first tried by the court without a jury and that the issues raised by the counterclaim be tried subsequently. There is no doubt that that procedure if carried out will operate in some degree to limit the petitioner's opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit. The complaint, as noted, presents the issues as to the existence of substantial competition between the parties in the San Bernardino area. This also is an issue raised by the counterclaim. Petitioner is correct in saying that if this issue be first tried and determined by the court in its proposed first trial the determination of that issue by the court will operate either by way of res judicata or collateral estoppel so as to conclude both parties with

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Beacon might well continue to make threats of the same nature against the distributors, threatening a series of such suits against them collectively or severally.

Conceivably this could continue at least until the treble damage suit had finally terminated in some court of last resort. It might possibly continue thereafter if Beacon claimed that additional or new facts then warranted a new round of treble damage suits. The very pendency of Beacon's suit throughout that time would tend to reinforce the strength of the threats. Moreover, we do not overlook the circumstance that because of its penalty aspects a threat of a treble damage suit is potentially more frightening than threats of an ordinary damage action.

respect thereto at the subsequent trial of the treble damage claim.

It seems plain enough that a party who is entitled to maintain a suit in equity for an injunction may have the issues therein determined by the court without a jury notwithstanding they involve a trial and determination of legal rights. No authority need be cited in support of this proposition, for illustrations of such cases are numerous. For example, in a suit by one in possession of real property to quiet title, or to remove a cloud on title, the court of equity may determine the legal title. In a suit for specific performance of a contract, the court may determine the making, validity and the terms of the contract involved. In a suit for an injunction against trespass to real property, the court may determine the legal right of the plaintiff to the possession of that property. Cf. *Pomeroy, Equity Jurisprudence*, 5th ed., Secs. 138-221, 221a, 221b, 221d, 250.

Petitioner asserts that notwithstanding all this, the requirements of the Seventh Amendment and of Rule 38 of the Federal Rules of Civil Procedure which recites that the right of trial by jury as declared by the Seventh Amendment shall be preserved to the parties inviolate, operates to qualify the court's right to order a separate trial of any claim under Rule 42(b), *supra*, so that under the circumstances here present, where both an equitable and a legal cause of action are present in a single proceeding, the court must of necessity try the legal claim first so that any issue of fact common to both actions may first be tried by jury. Some of the language used by this court in *Bruckman v. Hollzer*, 152 F. 2d 730, lends support to such an argument. In that case, the complaint sets forth separately three sets of transactions

upon which plaintiff claimed relief. In the first count, plaintiff sought recovery for money damages on account of alleged infringement of copyrights; in the second count, plaintiff sought an accounting for profits received by defendant through the appropriation of copyrighted matter; in the third count it was alleged that the defendant had infringed and intended to continue to infringe plaintiff's copyright, and plaintiff sought to enjoin the defendant from so continuing in such wrongdoing. Judge Hollzer, the respondent, who was the district Judge before whom the action was pending, ruled that he would commit the trial of the first cause of action to a jury to be tried at common law, and in his return to the petition for writ of mandamus, stated that he would simultaneously try without the jury the second and third causes of action "to the extent practicable." The defendants in the action then petitioned this court for mandamus to compel the respondent Judge to strike the demand for a jury trial and to hear and determine without a jury all three claims. It was noted that the issue of infringement was common to all three sets of transactions, and that if the right of jury trial of the issues raised by the first count was to be preserved, the jury's verdict upon that count would have to be entered before the claims under the second and third counts were decided. It was said that a consideration of Rule 38(a), preserving the right of trial by jury, when read in connection with those provisions of the rules which permit district courts to hear both equity and common law claims in a single suit, made it mandatory that the trial judge try the cause of action properly triable to a jury before the others. It was suggested that this was the only manner in which the right to trial by jury could be preserved. The court indicated

that a change had been effected by the adoption of the rules which it says accomplished "a long forward step in our judicial procedure."

It is to be noted, however, that the court simply denied the writ of mandamus. The respondent Judge there had ruled that he would permit the return of a verdict in the common law action in advance of the entry of any findings by the court upon the second and third causes of action, which were taken to be equitable in character. What this court said about the trial judge being *required* first to try with a jury the issues in the first cause of action was unnecessary to the decision. The actual decision was just as consistent with the view that it was within the discretion of the district Judge under Rule 42(b) to determine which causes of action should be tried first.

This court has had occasion in later decisions to point this out, and in each instance it has rejected arguments that the Hollzer case decided that the judge must first try the legal cause of action. In *Tanimura v. United States*, 9 cir., 195 F. 2d 329, the United States sued Tanimura for violation of maximum rent regulations and sought (1), an injunction against further violations; and (2), treble damages for the overcharges prior to the institution of the suit. The trial judge first tried the issues upon which the government based its claim to an injunction. The case went against Tanimura who objected that he was entitled as of right to a jury trial. We said: "It was within the sound discretion of the court as to whether the equitable issues or the law issues should take precedence in trial." The opinion quoted from and followed *Orenstein v. United States*, 1 cir., 191 F. 2d 184. The appellant on petition for rehearing asserted that this ruling of the court was contrary to *Bruckman*

Hollzer, *supra*. We noted, however, that the latter case was not to the contrary; that it merely held that the right of trial by jury extends only to issues not necessary or incidental to the equitable jurisdiction. This view of the Hollzer case was reinforced in *Institutional Drug Distributors v. Yankwich*, .... F. 2d ...., (June 2, 1957), where this court in holding it to be within the discretion of the trial judge to decide whether the equitable cause or the common law cause should first be tried, said in footnote 10: "Bruckman v. Hollzer, . . . does not hold to the contrary, as it, in effect, merely affirms the election of the trial court to try jury and non-jury issues contemporaneously."

We think these later decisions correctly point out that the Rules of Civil Procedure referred to in the Hollzer case were not designed to make any substantial change in the right to jury trial or to alter any pre-existing right of the trial judge to determine in his discretion whether trial of the suit in equity shall be prior to the submission of the issues in the legal action in any case where, as here, both types of action are presented by the pleadings. The rule stated in the Tanimura case, *supra*, is the same as that recognized prior to the adoption of the rules, namely, that the question as to which of the two types of actions should be tried first remains primarily within the discretion of the trial judge and is for the determination of that judge after consideration of various factors of fairness and convenience. Thus in *Amer. Life Ins. Co. v. Stewart*, *supra*, where the plaintiff's bill in equity for cancellation of the insurance policies was followed by actions at law brought by the beneficiaries in the same court to recover the insurance, the court, after holding that the suit in equity was properly brought and was within the court's



equitable jurisdiction, disclosed that the parties had stipulated that the suit in equity should be tried first. The court noted that had this stipulation not been made, a different arrangement might have been made, stating that in the exercise of a sound discretion the court could hold one action in abeyance to abide the outcome of another and said, (perhaps by way of dictum), that in the absence of the stipulation "If request had been made by the respondents to suspend the suits in equity till the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity. . . . There would be many circumstances to be weighed, as, for instance, the condition of the court calendar, whether the insurer had been precipitate or its adversaries dilatory, as well as other factors. In the end, benefits and hardship would have to be set off, the one against the other, and a balance ascertained." Plainly this suggests that after consideration of matters of the character there mentioned, it would be within the discretion of the court to determine which suit or action should be tried first. It thus appears that such was the case before the adoption of the Rules. Our decision in the Tanimura case, *supra*, says such is still the rule.

It was in that case that we adopted and approved the reasoning of the First Circuit in *Orenstein v. United States*, *supra*, a case in which certain identical questions of fact were presented in both equitable and legal causes of action. That court noted that if the judge chose to exercise his discretion so as first to make findings of fact in the equity portion of the proceedings upon such common issues, those findings would be binding upon all parties,

and in respect to them there would be no opportunity to relitigate them before the jury on the later trial of the legal action for damages.

Considerable reliance is placed upon the case of General Motors Corp. v. California Research Corp., D. C. Del., 9 F. R. D. 565. In that case, apparently influenced by certain language used in Moore's Federal Practice, the court said (p. 568): "It seems equally clear that where the complaint contains matter which is equitable in character and the counterclaim is legal in character, the court must determine the nature of the basic issues and if these are legal in character a demand for a jury trial must be granted." The judge concluded that the basic issues in that case were legal in character and that he was obliged to order a jury trial. The basic "issue" test to which the court there referred was plainly enough appropriate under the facts of that particular case which was not only primarily but exclusively an action for declaratory relief. It sought declaratory judgment of invalidity of two patents and of noninfringement by the plaintiff. The action was purely negative in character seeking a declaration that plaintiff was not liable upon defendant's claimed cause of action, but there were no allegations similar to those contained in paragraph XII of the complaint in this case which would disclose any basis for an independent suit in equity.

It is true that the plaintiff in the General Motors case, just cited, added a prayer for an injunction against a suit by the defendant for infringement of defendant's patent, but as the court remarked, this prayer did not operate to create any basic issue. Obviously it was a mere adjunct to the prayer for a declaration of rights. In the present case the complaint would resemble the complaint in the General Motors case if it contained nothing beyond para-

graph XI which is quoted above, and if paragraph XII were entirely omitted. What is wrong about the language quoted above from the General Motors case is its assumption that the complaint contains matter which is equitable in character. The statement as quoted is dictum. The complaint contained no such matter. In an effort to make use of the general language thus quoted Beacon argues that a basic issue here was whether the theatres are competitive or not. The contention is that this issue, which is common both to plaintiff's complaint in equity and to the cross-action at law, is necessarily legal in character and hence under the rule stated by the judge in the General Motors case, there must be a jury trial.

Where a typical complaint seeking declaratory relief, and nothing more, is filed, it is appropriate to adopt the language which Moore uses in dealing with such cases,—that the question as to the mode of trial “should be governed by a determination as to whether the basic nature of the issue is ‘legal’ or ‘equitable.’” The plaintiff seeking declaratory relief must contemplate that if he is seeking declaratory relief against a projected legal action by the defendant, the case will be for trial before a jury. Rule 57 so states.

But if the complaint be not a mere complaint seeking a declaration of rights but is in and of itself a statement of a claim within the exclusive jurisdiction of a court of equity, then the question is not so simple. If basically the nature of the plaintiff's complaint is one which alleges facts appropriate to a suit in equity such as the complaint now before us, the court is presented with a claim the basic nature of which is equitable, and it is of no consequence that some of the fact issues might under different

circumstances be appropriate fact issues in an action at law.

As we have previously indicated, many questions of fact are appropriately presented either in a suit in equity or in an action at law. Thus the question of title or right to possession to land, viewed as a question of fact, is appropriate in an action of ejectment but it is equally appropriate in a suit to quiet title. That Moore recognized this, is plain from his discussion in the sections mentioned. Some of his statements are noted in the margin.<sup>11</sup> It is

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<sup>11</sup>From §38.16, p. 152, 5 Moore's Federal Practice: "Under certain circumstances a party to a contract may have the choice of damages for breach, or specific performance and incidental damages. If he chooses to seek only damages the issues are legal; if he chooses specific performance and incidental damages all the issues are equitable.

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"By way of contrast take a different case as where the plaintiff sues for specific performance, the defendant pleads certain matter as a defense, and then also uses that matter as a basis of a legal counterclaim. The basic issue is whether the plaintiff has a valid contract, which is entitled to specific performance: if this is determined in his favor by the court that ends the case; only in the event that the defendant prevails as to the factual basis of his defense would issue, probably only as to the amount of damages, remain for jury trial.

"Where the controlling issue in a case is whether a contract should be reformed, the basic issue is equitable: whether the plaintiff seeks reformation so that he is entitled to recover on the reformed contract; or whether the plaintiff seeks reformation and the defendant interposes a legal counterclaim to recover on the contract as written."

(p. 151) "And the same principles apply where the plaintiff claims damages for injury to his property, and also seeks an injunction against future acts: the legal claim is basic. Here, however, the plaintiff could formulate his claim as one for an injunction with damages as an incident thereto: the basic issue would then be equitable and would carry with it the determination of the damages. "The basic nature of the issue in patent litigation will also depend upon the patentee's choice of remedy: an action by the patentee to recover damages under 35 USC §67 presents legal issues; an action by the patentee under 35 USC §70 for an injunction and damages presents equitable issues."

plain from his discussion that he would say that in this case, upon the filing of this complaint, all of the issues thereby presented were equitable. This is true notwithstanding that under other circumstances some of the same questions of fact presented in this suit in equity might also be questions of fact in an action at law.

We note that in *Leimer v. Woods*, 196 F. 2d 828, 836 the Eighth Circuit disapproved of the decision in *Orenstein v. United States*, *supra*, and cited with approval the *Bruckman* case without noting that the language of the latter case has been qualified and explained in *Tanimura Institutional Drug Distributors*, *supra*, makes that plain. The *Leimer* case supports petitioner's position here,<sup>12</sup> but for the reasons we have indicated we cannot agree with it.

It is our view that it is the doctrine of both the *Tanimura* and the *Institutional Drug Distributors* cases that the determination pursuant to Rule 42(b) as to whether the legal or the equitable claim or cause of action should first be tried is within the discretion of the trial judge. Of course, in exercising that discretion he should have in mind the considerations noted in the language previously quoted from *Amer. Life Ins. Co. v. Stewart*, *supra*, where it is suggested that the circumstances to be weighed are: whether plaintiff was precipitate or defendant dilatory, the condition of the court calendar, and the benefits and hard-

---

<sup>12</sup>The court there said: "In summary, a federal court may not under the Rules of Civil Procedure, in a situation of joined or consolidated equitable and legal causes of action, involving a common substantial question of fact, deprive either party of a properly demanded jury trial upon that question, by proceeding to a previous disposition of the equitable cause of action and causing the fact to become *res judicata*, unless there exist special reasons or impelling considerations for the adoption of such a pre-empting procedural course in the particular situation."



ships involved. The time for weighing those considerations was when the respondent made his order. Nothing here indicates an abuse of that discretion.

No suggestion made here that because the respondent judge could proceed to try the equitable injunction suit first, he could then proceed and take the further step of trying the questions presented by the counterclaim for damages under the ancient rule that the Chancellor may retain jurisdiction so as to grant complete relief. The respondent's order made it plain that there was no such proposal here. No doubt the statute requires the damage claim to be tried by jury. Cf. *Decorative Stone Co. v. Building Trades Council*, 2 cir., 23 F. 2d 426. The order preserves that right.

Since we have thus determined that the order of which petitioner complains was one within the discretion of the respondent, it is unnecessary to pass upon the questions relating to the writ of mandamus.

The petition for writ of mandamus is denied and the rule to show cause is discharged.

(Endorsed: ) Opinion. Filed Jan. 7, 1958.

Paul P. O'Brien, Clerk.

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SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

Case No. 123

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DAVID M. HARRIS, Plaintiff.

*Petitioner,*

THE HON. FRANK C. WHITTAKER, Judge of the United  
States District Court of the Southern District of Cal-  
ifornia, Central Division.

*Respondent.*

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

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IN THE  
**Supreme Court of the United States**

October Term, 1957

No. 905,

BEACON THEATRES, INC., a corporation,

*Petitioner,*

*vs.*

THE HON. HARRY C. WESTOVER, Judge of the United  
States District Court of the Southern District of Cali-  
fornia, Central Division.

*Respondent.*

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI.**

**Introduction.**

Under circumstances when the facts justify it it may well be appropriate for this Court to take cognizance of and rule upon what may become (but is not now, as we shall demonstrate later) a conflict between the Circuits as to the proper relationship of Federal Rules of Civil Procedure 18(a) and 42—the former permitting the joinder of legal and equitable claims in a single complaint, and the latter dealing with the trial court's discretion with respect to consolidation and separate trials—and Rule 38(a) preserving the constitutional right to jury trials. However, the record in this case, the Petitioner's gratuitous assertions to the contrary notwithstanding, just

does not support its principal thesis that the Respondent judge by the exercise of the discretion conferred upon him under Rule 42(b) has in fact deprived the Petitioner of a jury trial upon any substantial or material issue raised by its cross-claim under the antitrust laws.

### The Factual Background.

Before embarking upon important questions of constitutional law and whether the Federal Rules of Civil Procedure encroach upon the inalienable right to a jury trial, we review briefly the factual background of this litigation as reflected in the record of this case.

This litigation had its genesis in *United States v. Paramount Pictures, Inc., et al.*, 334 U. S. 131, 92 L. Ed. 1260, 68 S. Ct. 915, which became the progenitor of the vast number of treble-damage suits to which the cases in the Federal Reports bear silent testimony.

Actual litigation in the form of innumerable treble damage actions was not the only offspring born of the *Paramount* case, however; the threat of litigation itself became and is a potent weapon in the hands of so-called "independent" exhibitors to obtain concessions from the major distributors of motion pictures, the defendants in the *Paramount* case: concessions that are neither economically justifiable nor legally required. Such a case is the present one.

The *Paramount* decision had given judicial recognition to the rather patent economic fact that a motion picture cannot profitably—or indeed at all—be shown simultaneously in all theatres; accordingly, as alleged in the complaint at bar, the defendants in the *Paramount* case were permitted to grant a priority of run to a theatre

found to be "in substantial competition" with a competitive theatre and a clearance over the next succeeding run, reasonable as to time and area, was found to constitute a justifiable restraint of trade [Par. VII of Complaint, R. 18-21].

Cognizant of the impracticality of attempting to judicially govern the detailed facets of motion picture distribution throughout all areas of the United States, the *Paramount* case further decreed that "the decision of such controversies as may arise over clearances should be left to local suits in the area concerned" [R. 19].

When Beacon Theatres, Inc. built its theatre—a drive-in—within a scant twenty minutes from downtown San Bernardino where Fox West Coast Theatres Corporation operated its California Theatre, and demanded, under threats of antitrust litigation, the right to exhibit any motion picture at the same time as the California Theatre or any other theatre in the area might exhibit it (thereby diluting the patronage at both theatres if they were in fact competitive for any substantial portion of the same theatre-going public), Fox West Coast was faced with three alternatives: It could capitulate to the threats and reconcile itself to absorb the consequent loss; it could sit by hoping that the distributors of the pictures would not be cowed and wait for the threatened lawsuit, trusting eventually that it or the distributors would win it; or it could do as it did here. It sought the relief of the District Court for the Southern District of California and asked it to abate the economic duress and threats of antitrust litigation being levied by Beacon Theatres if its demands for preferential treatment were not acceded to, and to adjudicate for the benefit of all concerned whether in fact

there existed that substantial competition between the California Theatre and the new Drive-in as would justify the *Paramount* defendants in permitting *either* theatre to negotiate and compete for the license of a picture for exhibition ahead of and with clearance over the other theatre.

### **The Cross-Claim for Treble Damages Under the Anti-trust Laws.**

Faced with the request that its threats of antitrust litigation be enjoined and the leverage of those threats be dissipated, the Petitioner, after exhausting various dilatory tactics against the complaint for declaratory and injunctive relief, such as motions to dismiss for failure to state a claim and for lack of jurisdiction of the court, filed a cross-claim for \$300,000 treble damages, alleging a conspiracy in restraint of trade by Fox West Coast, Pacific Drive-In Theatres, Stanley-Warner Theatres and the major distributors of motion pictures to prevent the new Drive-in from getting first-run pictures in the area.

It should not have to be the province of this Court to have to examine, analyze and interpret pleadings in an interlocutory proceeding before trial or judgment in the District Court. Suffice it to say that in the cross-claim for treble damages alleging a conspiracy in restraint of trade and to monopolize [the pertinent allegations of which are to be found in R. 50-52], the issue of competition between the same theatres for much of the same patronage is nowhere raised, and its resolution as a question of fact by the Court on the complaint for injunctive and

declaratory relief if determinative of anything on the cross-claim would go only to the quantum of damages alleged to have been sustained.<sup>1</sup> The burden of the cross-claim for damages is based, as it would have to be, upon a wrongful conspiracy in restraint of trade and asserts that Fox West Coast, Pacific Drive-in Theatres and Stanley-Warner Theatres had conspired to obtain and retain all of the first-run pictures for themselves in the San Bernardino area. A jury trial was demanded on the issues raised by both the complaint and the cross-claim.

**The Separation of the Issues and Separate Trial  
Granted by the Respondent Judge.**

The trial judge, with a fortitude which, but for the glaring inadequacies of the present Petition, we would wish to see commended by this Court, saw through the patent strategy of the Petitioner and refused to permit the simple issue (of the presence or absence of substantial competition between two theatres) and the equitable appeal made to him (to enjoin continued trade against the Paramount distributors) to become obfuscated

---

<sup>1</sup>If the Respondent judge finds the theatres to be competitive, as Fox West Coast contends in its complaint for injunctive and declaratory relief, the finding would militate in favor of the Petitioner should it ultimately establish the wrongful conspiracy to deprive it of first-run pictures it alleges in its cross-claim. If the Respondent judge were to find that the theatres were not substantially competitive, as the Petitioner contends in its answer to the complaint [R. 38], this would of course constitute no defense to the charges of conspiracy in restraint of trade and to monopolize, but might reflect upon the damages which Petitioner asserts it has sustained by reason of the alleged violation of the Sherman Act, for clearly if the allegedly "favored" theatres were not competitive to the new Drive-in it could not have been greatly harmed by the alleged discriminations against it.



in the illimitable generalities and inevitable delays of a time-consuming antitrust trial before a jury.<sup>2</sup>

Having pleaded a meritorious case for injunctive and declaratory relief, the Respondent Judge concluded that Fox West Coast should be entitled to have its case heard and decided as presented,<sup>3</sup> and that if there were any merits to Beacon Theatre's general charges of antitrust violations they might have their full day in court at a later date to prove them to a jury. In his Response to the Order to Show Cause why the Petition for Writ of Mandamus should not be granted, the trial judge succinctly stated the basis for his ruling:

"(3) In separating the issues in said action and in ordering an early trial of the issues raised by the complaint of plaintiff therein, respondent was performing a judicial act within his jurisdiction and discretionary power and was thereby exercising his said judicial discretion and fully performing his judicial functions and duties in accordance with Rules 57 and 42b of the Federal Rules of Civil Procedure. That it was and is the position of respondent that plaintiff may not be deprived of its prerogative of

<sup>2</sup>Mr. Moses Lasky characterizes the burden of defending against antitrust charges in 43 Cal. Law Review at page 598:

"With the Long Bow aimed at a defendant's heart by our modern merry Robin Hoods, the preparation of the defense of an antitrust case becomes, if not an almost impossible or superhuman task, at least a costly one. To what shall counsel address his investigation? What evidence shall he prepare to meet, to explain, to supplement? The answer is everything. Anything at all."

<sup>3</sup>F. R. C. P. Rule 57 provides in part: "The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar."

securing an early judicial declaration of its rights by the Court as presented by its complaint for declaratory judgment by the expedient of a Cross-Claim under the anti-trust laws raising wholly different and divergent issues from those raised by the complaint and answer thereto and upon which Cross-Claim a jury trial is demanded." [R. 115.]

The trial judge was further meticulously careful to preserve to the Petitioner intact its right to a jury trial upon the issues raised by its cross-claim for antitrust violation, striking for that purpose the affirmative defense and allegations of the same antitrust violations from Petitioner's answer to the complaint, to the end that none of the material issues similarly raised by the cross-claim might be prejudged by the court in the action for injunctive and declaratory relief. In this respect the trial judge stated in his Response to the Order to Show Cause:

"(2) Respondent has not and does not propose to deny to defendant a jury trial upon the legal issues presented by its Cross-Claim.

\* \* \* \* \*

"(4) Contrary to the averment contained in Paragraph XI of petitioner's Petition for Writ of Mandamus, a determination of the issues raised by the complaint in said action will not serve as an adjudication of the basic issue raised by defendant's Cross-Claim, to wit, that of conspiracy to restrain trade which will remain undecided until the trial of the issues raised by said Cross-Claim." [R. 115.]

I.

**There Is No Common Substantial and Material Issue  
Between the Antitrust Cross-Claim on Which  
Jury Trial Has Been Preserved and the Com-  
plaint for Declaratory and Injunctive Relief.**

The trouble with the present Petition is that throughout its length it attempts to mould this case into the framework of what have rather facilely been termed "juxtaposition of the parties" cases; that is, to quote the usual case, an insurer having a defense such as material misrepresentation to its liability on the policy beats the insured into court in an action for declaratory judgment to have the policy annulled. Almost without exception the courts have sustained the insured's right to a jury trial and, as pointed out in the Petition, have held that after loss on the policy has occurred the insurer has an adequate remedy at law as a defense. See for example *Di Giovanni v. Camden Fire Ins. Assoc.*, 296 U. S. 64, 80 L. Ed. 47, 56 S. Ct. 1; *Ettelson v. Metropolitan Life Ins. Co.*, 317 U. S. 188, 87 L. Ed. 176, 63 S. Ct. 163 and other cases cited pages 21-23 of the Petition; and see such statements as the following from page 25 of the Petition:

This is true because in this action, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant had intended to assert as a complaint and has in fact asserted as a counterclaim. Fox West Coast here, has sought to anticipate imminent legal action by petitioner by seeking a declaratory judgment to the effect that it would have a good defense when that cause of action was asserted. Where the complaint in an action for

declaratory relief seeks in essence to assert a defense to an impending or threatened complaint at law, it is the character of the threatened complaint at law, and not of the defense, which will determine the right to jury trial."

We have no quarrel whatever with these rather elemental propositions; but unfortunately for Petitioner they are completely foreign to the issues presented in this case.

Again, we reiterate that this Court should not be called upon to analyze pleadings and the issues raised by them, but it becomes unfortunately necessary when the Petition fails to correctly state them. The Complaint for Declaratory Judgment was the very antithesis of an anticipatory defense to an anticipated antitrust suit. The burden of the complaint was that Fox West Coast deemed its California Theatres and the Petitioner's Drive-in to be sufficiently competitive as would justify either theatre in negotiating with the *Paramount* defendant distributors for a prior run of a picture over the other but that Petitioner was interfering with this right to compete by its threats that if any distributor awarded the California Theatre a prior run and did not give the Drive-in the right to play the picture simultaneously, it would bring action under the antitrust laws and treat such act as an "overt act in concert with any distributor who may grant plaintiff (Fox West Coast) such clearance or such priority of run in restraint of trade and a violation of the Sherman Antitrust Act and of the decrees" in the *Paramount* case [R. 23-24]. The complaint proceeded to allege:

"That said threats and the duress and coercion upon the Distributors arising out of and resulting from said threats of litigation threaten to and have in fact deprived plaintiff and its said California

Theatre of the right to negotiate for motion pictures upon their first-run in the San Bernardino area and to negotiate for clearance over theatres in competition with plaintiff's said theatre upon said first-run, including defendant's Bel-Air Drive-In Theatre." [R. 24.]

The Complaint prayed:

"2. That it be decreed that the Distributors are and each of them is entitled to negotiate with plaintiff and defendant and with other owners and operators of theatres in said competitive area equally for a prior run in said competitive area." [R. 25.]

How the Petitioner could torture these clear allegations seeking a clarification of the plaintiff's *right to compete* against Petitioner's Drive-in into an anticipatory defense to a cross-claim for treble damages, charging a conspiracy to *prevent Petitioner from competing* for first-run pictures [R. 50-52], may be a tribute to the ingenuity of counsel but nonetheless remains a mystery.

To illustrate the hollowness of the claim that Fox's defense to the antitrust charge is being prejudged by the Court without a jury, one has only to imagine Fox West Coast defending the allegations of conspiratorial monopolization of first-run pictures in the area by asserting loudly, "We cannot be liable because the judge has found that the theatres involved are substantially competitive"! In short, as shown above, the issue of competition or absence of competition between the theatres for the same potential pool of theatre-goers has not the slightest bearing on whether Fox West Coast and its alleged companion conspirators may have conspired in violation of the Sherman Act. The whole argument of the Petitioner is a sham:



It is true the opinion in this case states: "The complaint, as noted, presents the issues as to the existence of substantial competition between the parties in the San Bernardino area. This is also an issue raised in the counterclaim." [R. 188.] It is an issue raised in the counterclaim but only in the most incidental sense, in that if the conspiracy in restraint of trade is proved the damage impact upon the Petitioner's Drive-in will be less if there is no real competition between the theatres for the same patronage (as Petitioner contends) than if the Court finds there to be substantial competition between them (as Fox West Coast contends). If this is an unconstitutional deprivation of jury trial then the Seventh Amendment would stand as an effective block in virtually any and every suit in equity to which any unrelated and dissimilar cross-claim at law might be interposed. It is a sure way to have every equity case tried to a jury.

If it be suggested that the question of competition between the theatres is relevant to the "clearance" charge of the antitrust cross-claim [see "overt act No. 4", R. 51], the answer is furnished from the pleading itself. The cross-claim charges that the unlawful conspiracy and attempt to monopolize consisted of a continuing agreement between the conspirators:

"4. To impose clearance in favor of said protected theatres of Fox West Coast Theatres Corp., Pacific Drive-in Theatres Corp. and Stanley-Warner Corporation in San Bernardino against independent outsiders, including defendant's Belair Theatre, for the purpose of protecting the monopoly of first-run exhibition and first-run patronage conferred on the theatres of Fox West Coast Theatres Corporation, Pacific Drive-in Theatres Corporation and Stanley-

Warner Corporation, and for the purpose of protecting said theatres from competition." [R. 51.]

Conceding that a grant of clearance between theatres in substantial competition is a reasonable restraint as found in the *Paramount* case [R. 19-20], it is clearly not such if, as alleged in the cross-claim, it is granted pursuant to a continuing conspiracy to protect the alleged first-run monopoly of the conspirators. Obviously, a finding of competition between the theatres, if such should be made by the Respondent judge, would be no defense to this charge of malefaction; it would, if anything, aggravate it. If he finds no competition between the theatres, the alleged conspiracy to exclude the Petitioner's theatre from first-run privileges, if proven, would certainly be no less wrongful.

Here again, the application of only the simplest process of reasoning betrays the fallacy of the whole thesis of the Petition, that the issues in the two actions are the same or even overlap. We descend to this elementary exposition to give the lie to such irresponsible statements as: "if the Court determines to try the anti-trust issues under the equitable claim for an injunction first that Rule 42b provides the source of such power even though the effect is to destroy the right of jury trial" (Pet. p. 19).<sup>4</sup> There is not the remotest resemblance to any "juxtaposition of the parties" in this case and no anti-trust issue on the pleadings in this record is going to be foreclosed by the Court's findings on the existence or absence of substantial competition and no one should know it better than counsel for the Petitioner.

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<sup>4</sup>Equally out of tune with the issues presented by the pleadings is the statement from p. 25 of the Petition, quoted *supra*, pp. 8-9;

Other Misconceptions of the Issues Presented.

Whether purposely done we know not, but the Petition again and again confuses the issues that this Court is asked to review. For example, citing *Prudential Insurance v. Saxe*<sup>5</sup> and *Phoenix Mutual Life Insurance Co. v. Bailey*,<sup>6</sup> the Petition observes "when a defense could be interposed to an action at law and such action was imminent or pending there was no occasion for equitable relief" (Pet. p. 21). Of course, not; but what has that got to do with this case? What defense would it be to the antitrust allegations of the counterclaim charging conspiratorial discrimination in favor of the Fox-owned theatre for Fox West Coast to prove that the theatres were in substantial competition one to the other? In fact, a jury verdict on the counterclaim either in favor of Petitioner or of Fox West Coast would shed no necessary light at all on the controversy the plaintiff is seeking to have declared—whether the parties are free to negotiate for a prior run for one theatre over the other within the proscriptions of the *Paramount* decrees.

Another example of seemingly purposeful obfuscation in the Petition appears at pages 26 and 27 where the Petitioner discusses patent cases involving the patentee's threats of infringement actions against the defendant's customers and which hold in effect that the determination of whether there is an infringement in fact will abate the threats. Such cases may be interesting, but they have nothing whatsoever to do with the issues here, where the complaint alleges the wrongful interference with a

<sup>5</sup>C. A. D. C. 134 F. 2d 16.

<sup>6</sup>13 Wall. 616, 80 U. S. 616, 20 L. Ed. 501.

valuable property right of the plaintiff, to-wit, the right to be free to negotiate with the distributors of motion pictures for a prior run of a picture. The opinion meets this issue head on when it states:

"Turning then to the complaint in this case, it is there manifest that Fox seeks protection for its 'right to negotiate for motion pictures upon their first-run in the San Bernardino area and to negotiate for clearance over theatres in competition with plaintiff's said theatre upon said first-run including defendant's Bel-Air theatre.' The authorities which we have cited disclose that a right so to negotiate, sufficiently partakes of the nature of a property right or sufficiently resembles a property right as to be entitled to protection through the use of the injunctive process against intentional and wrongful acts calculated to destroy it, provided only that there is not a complete or adequate remedy at law." [R. 184.]

The opinion goes on to conclude that there was no adequate remedy at law when the complaint was filed, and in its footnote 10 [R. 187] demonstrates that even the prior filing of the antitrust suit would not have furnished an adequate remedy at law.

We would prefer to see the Petitioner meet these clearly stated issues than indulge in the irrelevant excursions with which its Petition is so replete.

II.

**There Is No Conflict Between the Circuits in This Case.**

The principal reason advanced for this Court to grant certiorari is that the Beacon case adds yet another to the list of Circuit Court decisions of the First and Ninth Circuits substantially in conflict with the decision of the Eighth Circuit in *Leimer v. Woods*, 196 F. 2d 828.

In the first place, if there is any such conflict, the present case upon its facts represents an inadequate vehicle for a resolution of the conflict.

The opinion in this case, after quoting Rule 42b, states:

"The question is whether, notwithstanding that provision, some other rule or requirement relating to the right to trial by jury prohibited the Respondent from directing that the issues raised by the complaint be first tried by the Court without a jury and that the issues raised by the counterclaim be tried subsequently. There is no doubt that that procedure, if carried out, will operate in some degree to limit the Petitioner's opportunity *fully* to try to a jury *every issue* which has a bearing upon its treble damage suit. The complaint, as noted, presents the issues as to the existence of substantial competition between the parties in the San Bernardino area. This is also an issue raised by the counterclaim." [R. 187; italics ours.]

We have adverted above to the extremely limited role played by the question of substantial competition between the theatres upon the broad issues raised by the antitrust cross-claim, observing that at best a finding upon the presence or absence of substantial competition can reflect



only upon the impact upon the Petitioner's Drive-in Theatre of the conspiracy charged. The court in *Leimer v. Woods*, took pains to note, page 836:

"In summary, a federal court may not under the Rules of Civil Procedure, in a situation of joined or consolidated equitable and legal causes of action, *involving a common substantial question of fact*, deprive either party of a properly demanded jury trial upon that question, by proceeding to a previous disposition of the equitable cause of action and so causing the fact to become *res judicata*, unless there exist special reasons or impelling considerations for the adoption of such a pre-empting procedural course in the particular situation." (Italics ours.)

As noted above, the existence or non-existence of substantial competition between theatres is not a common *substantial* question of fact, and we believe from the portion of the opinion of the Ninth Circuit Court quoted above that while it regarded the question of competition to be a common fact issue, it did not regard it as a substantial issue.

Furthermore, the *Leimer* case excepts from its holding cases where "there exist special reasons or impelling considerations for the adoption of such a pre-empting procedural course in the particular situation." The Court of Appeals in the *Beacon* opinion similarly conditions the exercise of the Court's discretion under Rule 42b by the considerations suggested by this Court in *American Life Insurance Co. v. Stewart*, 300 U. S. 203, 57 S. Ct. 377, 81 L. Ed. 605, that is, "whether plaintiff was precipitate or defendant dilatory; the condition of the court calendar, and the benefits and hardships involved." [R. 195.] The Respondent judge predicated the exercise of his discretion under Rule 42b upon the ground,

"that plaintiff may not be deprived of its prerogative to secure an early judicial declaration of its rights by the court as presented by its complaint for declaratory judgment by the expedient of a Cross-Claim under the anti-trust laws raising wholly different and divergent issues from those raised by the complaint and answer thereto. \* \* \* [R. 115.]

We submit, that in the posture of the present case there is in fact no conflict between the *Leimer* decision and the present case. As stated by the commentator in note, 39 Iowa Law Review 350, discussing the *Orenstein*<sup>7</sup> and *Leimer* lines of authority, the difference is at best but one of degree, page 353:

"Therefore, it is seen that under both the *Orenstein* and *Leimer* views a trial court is given some discretion as to the order of trial. The difference between these views is in the degree of discretion given to the court. The *Orenstein* view allows the court to determine the order of trial in its *absolute discretion* regardless of any sound reason to try the equitable claim first.<sup>8</sup> The *Leimer* view cuts down this discretion so that there must first exist some *compelling reason* for trying the equitable claim first. The problem raised by these cases is the question of the degree of discretion allowed the trial court."

If the distinction is, as suggested, the degree of discretion allowed the trial court, we suggest that the reasons which impelled the Respondent trial judge to sepa-

<sup>7</sup>191 F. 2d.184.

<sup>8</sup>We question the soundness of this interpretation in view of the well-settled rule that judicial discretion is never mere whim or caprice but must have facts to support and justify it.

*Stanton v. United States* (C. A. 9), 226 F. 2d 822, 823;

*Smaldone v. United States* (C. A. 10), 211 F. 2d 161, 163.

rate the issues of the complaint for declaratory and injunctive relief and to attempt to grant plaintiff an early trial upon those issues in advance of the cross-claim for treble damages, were sufficient in themselves to have met the more stringent limitations posed by the *Leimer* case.

There was still another compelling reason for the trial judge to have separated the issues and granted separate trials. The foundation of the action brought by Fox West Coast lay in the injunctive provisions in the *Paramount* case under which the distributors were precluded from granting clearance except as between theatres in "substantial competition" to each other [see allegations, R. 20]. Thus Fox West Coast would be required to introduce into evidence the decrees in the Government case. Were its action to be tried before a jury concurrently with the antitrust cross-claim, material prejudice would result from the jury having before it the adjudications in *United States v. Paramount*. Upon a separate trial of the antitrust cross-claim, in view of the fact that Petitioner's theatre did not commence doing business until November of 1956, the *Paramount* decrees would not be admissible in evidence because relating to a period long subsequent to the effective date of the *Paramount* findings. (*Paramount Film Distributing Corp. v. Village Theatre* (C. A. 10), 228 F. 2d 721, 727; *Steiner v. Twentieth Century-Fox Film Corp., et al.* (C. A. 9), 232 F. 2d 190; *Hillside Amusement Co. v. Warner Bros, et al.* (C. A. 2), 224 F. 2d 629, 630.)

We conclude, therefore, that the justification for the separate trials of the two distinct actions would have fallen well within the ambit of the discretion of the trial judge allowed by the *Leimer* decision and that in fact this case presents no conflict between the circuits.

III.

**The Right to a Jury Trial Has Been Preserved to  
Petitioner, Not Denied to It.**

All parties are agreed that the adoption of the Rules was not designed to affect the substantive rights of litigants as they existed prior to the Rules and, as Petitioner points out, Section 2 of the Enabling Act (Pet. App. A, p. 2) expressly provided that in the union of rules between law and equity the right of trial by jury as at common law and declared by the Seventh Amendment shall be preserved. Contrary, however, to Petitioner's claim, the approbation given in this case to the exercise of his discretion by the trial judge to separately try the issues of the complaint in equity from the issues of the cross-claim, the latter to be tried to a jury, preserves for the Petitioner its right to jury trial to an extent greater than existed prior to the Rules.

Before the Rules, setting up a legal counterclaim to a suit in equity, automatically forfeited the defendant's right to a jury trial on its counterclaim. *American Mills Co. v. American Surety Co.*, 260 U. S. 360, 366, 43 S. Ct. 149, 67 L. Ed. 306, 309; *Horwitz v. New York Life Ins. Co.* (C. A. 9), 80 F. 2d 295, 301;

"Defendant was not obliged to assert a legal counterclaim in an equitable action, but, having done so, he has waived his right to a jury trial and put the entire case in equity. *American Mills Co. v. American Surety Co.*, 260 U. S. 360, 366, 43 S. Ct. 149, 67 L. Ed. 306; *Clifton v. Tomb* (C. C. A.), 21 F. (2d) 893, 898."

In this case, in the exercise of the discretionary power conferred upon him by Rule 42(b) the Respondent Judge has preserved to the fullest possible extent Petitioner's

right to a jury trial on its antitrust cross-claim—a right which prior to the Rules it would have lost—while at the same time preserving to the plaintiff its right to what was intended to be an expeditious determination of a controversy threatening plaintiff with what it claimed would result in irreparable injury and against which it had no adequate remedy at law [R. 24]. To refuse to permit plaintiff's rather simple but nonetheless urgent request for declaratory and injunctive relief to become lost in the vague charges, inferences from business conduct and insinuations inherent in a general claim of monopoly and conspiracy tried to a jury, we submit was the soundest possible exercise of its discretion by the trial court and the Court of Appeals was eminently correct in refusing to interfere with that discretion by mandamus.

#### IV.

#### Appeal, Not Mandamus, Is the Proper Means of Reviewing the Claimed Error.

The present Petition represents a classic illustration why interlocutory appeals, in the form of an application for an extraordinary writ before judgment, have always been and are now so greatly discouraged by the courts.<sup>9</sup> We have it on the Petitioner's say-so only that an important and substantial question of fact is common to both the action for declaratory and injunctive relief and the antitrust cross-claim and that hence Petitioner will

<sup>9</sup>See—*Parr v. United States*, 351 U. S. 513, 520, 100 L. Ed. 1377, 76 S. Ct. 912; *Bankers Life and Casualty Co. v. Holland*, 346 U. S. 379, 382, 98 L. Ed. 106, 74 S. Ct. 145; *Ex parte Fahey*, 332 U. S. 258, 260, 91 L. Ed. 2041, 67 S. Ct. 1558; *United States Alkali Export Assn. v. United States*, 325 U. S. 196, 202, 89 L. Ed. 1554, 1560, 65 S. Ct. 1120; *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 26, 87 L. Ed. 1185, 1190, 63 S. Ct. 938.



be deprived of a jury determination on this issue. We controvert this unsupported assertion and have shown that from the pleadings (all that the parties have to turn to at the present juncture) the question of the existence or absence of competition between the theatres can have but little if any bearing on the antitrust allegations; that competition or lack of competition between the theatres would constitute no defense nor even mitigation if Petitioner can make good on its allegations that the cross-defendants and the major distributors of motion pictures conspired to perpetuate a first-run monopoly in behalf of certain favored theatres in the San Bernardino area, that they conspired to discriminate against Petitioner's theatre and that they agreed not to compete against each other.

Had Petitioner been content to await judgment on its cross-claim it would then have been in a position on a trial record to demonstrate whether or not it had been prejudiced in fact, by the exclusion of evidence or otherwise, by a predetermination by the court of the question of substantial competition between the theatres, thereby eliminating that question from jury consideration. The Circuit Court should not, and *a fortiori* this Court should not, be called upon to weigh assertion against counter-assertion and to interpret pleadings and counter-pleadings under The All Writs Act (28 U. S. C. A., Sec. 1651) without the benefit of a trial record to determine whether the plaintive cry of deprivation of jury trial has any substance to it. Had it come to the question, we are satisfied that the Circuit Court would have denied the Writ of Mandamus here as an inappropriate interlocutory remedy.

At the expense of a rather lengthy quote, we repeat what this Court had to say respecting the office of a Writ of Mandamus in *Banker's Life and Casualty Co. v. Holland*, 346 U. S. 379, 98 L. Ed. 106, 74 S. Ct. 145, where in affirming denial of the writ, it was said, p. 382 of 346 U. S.:

"The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 U. S. C. §1651(a). As was pointed out in *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 26, 87 L. ed. 1185, 1190, 63 S. Ct. 938 (1943), the 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. \* \* \* Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, *Roche v. Evaporated Milk Assn.* (U.S.) supra, and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than

used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in *De Beers Consol. Mines v. United States*, 325 U. S. 212, 217, 89 L. ed. 1566, 1572, 65 S. Ct. 1130 (1945). This is not such a case.

"It is urged, however, that the use of the writ of mandamus is appropriate here to prevent judicial inconvenience and hardship occasioned by appeal being delayed until after final judgment. But it is established that the extraordinary writs cannot be used as substitutes for appeals. *Ex parte Fahey*, 332 U. S. 258, 269, 91 L. ed. 2041-2043, 67 S. Ct. 1558 (1940), even though hardship may result from delay and perhaps unnecessary trial, *United States Alkali Export Assn. v. United States*, 325 U. S. 196, 202, 203, 89 L. ed. 1554, 1560, 1561, 65 S. Ct. 1120 (1945); *Roche v. Evaporated Milk Assn.*, *supra* (319 U. S. at 31); and whatever may be done without the writ may not be done with it. *Ex parte Rowland*, 104 U. S. 604, 617, 26 L. ed. 861, 866 (1882). *We may assume that, as petitioner contends, the order of transfer defeats the objective of trying related issues in a single action and will give rise to a myriad of legal and practical problems as well as inconvenience to both courts; but Congress must have contemplated those conditions in providing that only final judgments are reviewable. Petitioner has*

alleged no special circumstances such as were present in the cases which it cites.

\* \* \* \* \*

"We adhere to the language of this Court in *Ex parte Fahey*, supra (332 U. S. at 259, 260):

"Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. As extraordinary remedies, they are reserved for really extraordinary causes." (Italics ours.)

The purpose of Rule 42b, which of course is based upon the need for the orderly administration of the business of the trial court, is to repose discretion in the trial judge to the end that he may most efficiently dispose of the judicial business before him. No appellate court should, nor would it desire to, interfere with this function of the trial court, particularly in an interlocutory proceeding before trial where error, if any, can be fully reviewed on appeal. As the same Court of Appeals observed in *Institutional Drug Distributors v. Yankwich*, 249 F. 2d 566, a strikingly similar application for a Writ of Mandamus prosecuted by the same counsel representing Petitioner here, page 570:

"Therefore, the District Court must not be trammelled by premature expressions on our part. If a mistake be made, there are methods of correction, which are no more expensive than retrials, which this Court has been compelled to order in other

cases. The District Court has the full record before it and must determine whether Institutional was ever entitled to a jury trial and whether that right, if any, has been waived or still exists.

\* \* \* \* \*

"This Court should not interdict a trial unless it is demonstrated that a right of petitioner has been infringed. We are bound to assume that the trial court is proceeding properly. There has been no showing to this Court that, if it be assumed Institutional had a right, appeal from the final judgment or some other course would be a clearly inadequate remedy.

"As it is, we are haunted by the specter of multiple appeals to this Court. That is indeed an evil. To avoid such appeals in this and other cases, no action should be now taken.

"The application to file a petition for writ of mandamus is denied."

### Conclusion.

✓ Certiorari should not be granted on a record as indefinite and uncertain as the present where in effect we have nothing more than the Petitioner's gratuitous assertion that it is being denied a jury trial upon an important fact issue in its cross-claim under the antitrust laws. The pleadings and the application of common sense belie the fact that the presence or absence of substantial competition between the theatres involved will be either determinative of or material to the charges of conspiracy to keep first-run pictures from the Petitioner, to favor the alleged conspirators and to discriminate against Petitioner's theatre or to eliminate competition between the alleged conspirators themselves.



Moreover, if there is any conflict in the Circuit Court decisions as to the factors which should govern the trial court's discretion with respect to the order in which equitable and legal issues should be tried, this case does not truly reflect the conflict because we are satisfied that no different result would have been reached had the Eighth Circuit considered the Petition for Mandamus in this action.

The Petitioner has succeeded in delaying the early trial of the Plaintiff's action for declaratory and injunctive relief which Rule 57 contemplates for a period of more than eighteen months and its Petition for a Writ of Certiorari should be forthwith denied.

Respectfully submitted,

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### A.

A suit for declaratory judgment, which is filed in anticipation of and as a substitute for a suit for damages under the anti-trust laws, wherein a litigant would have a right to jury trial is triable to a jury, upon demand, under the Seventh Amendment to the Constitution of the United States and Rule 57 of the Federal Rules of Civil Procedure..... 18

ii.

PAGE

B.

A complaint for declaratory relief which also seeks an injunction against threats of litigation is triable to a jury. Prior to the adoption of the Federal Rules, the complaint herein, as a bill in equity, would have been dismissed since it failed to show that petitioner did not intend to follow up the threats with a test of his right in court. Moreover, after the filing of the counter claim, the remedy at law was adequate .....

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C.

Where an action involves separate trials, one by the court and one by the jury, and common basic issues of fact exists, the right to jury trial under the Seventh Amendment may not be defeated by the prior trial by the court of these common basic issues. Rule 42(b) of the Federal Rules of Civil Procedure neither requires nor permits this result.....

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IN THE  
**Supreme Court of the United States**

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October Term, 1958.

No. 45

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BEACON THEATRES, INC., a corporation,

*Petitioner,*

vs.

THE HON. HARRY C. WESTOVER, Judge of the United States District Court of the Southern District of California, Central Division, Fox West Coast Theatres Corporation, Pacific Drive-In Theatres, Inc.,

*Respondent.*

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**BRIEF FOR THE PETITIONER.**

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**Opinion Below.**

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 252 F. 2d 864.

**Jurisdiction.**

The order of the Court from which Certiorari was sought was entered on January 7, 1958. [R. 102.] The Order Extending Time to File Petition for Writ of Certiorari was extended to and including April 8, 1958. [R. 126.] The Petition for Writ of Certiorari was filed on April 8, 1958, and was allowed on May 19, 1958. [R. 126]. The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

### The Questions Presented.

In anticipation of an imminent suit for damages by petitioner, under the Clayton and Sherman Acts (Title 15 U. S. C., Secs. 1, 2, 15) wherein petitioner as plaintiff would have been entitled to a jury trial as a matter of right, the prospective defendant (Fox West Coast Theatres Corp.) hereinafter referred to as Fox West Coast filed and served a complaint for declaratory judgment. The complaint raised substantial issues common to the impending damage suit by petitioner. Subsequently, in this action, those issues were raised by petitioner in its counterclaim for damages under the antitrust laws, 15 U. S. C., Secs. 1, 2, and 15. The trial court held, over petitioner's objection, that it would try those common issues as a part of respondent's declaratory judgment action, without a jury, before the trial of petitioner's counterclaim, although such prior trial by the court thereby would deprive petitioner of the right to try those substantial issues to the jury.

Upon petition to the Court of Appeals for the Ninth Circuit for a Writ of Mandamus, that court held that a federal court had discretion under Rule 42(b) of the Federal Rules of Civil Procedure to deprive petitioner of its right to trial by jury on those common issues because the complaint for declaratory judgment contained allegations of petitioner's prior threats that it intended to file such a damage suit and allegations of irreparable in-



jury resulting therefrom, thus stating a claim which was "equitable" in nature.<sup>1</sup>

The questions presented are the following:

1. May a Court of Appeals hold, under the Seventh Amendment to the Constitution and Rule 57 of the Federal Rules of Civil Procedure, that substantial issues of fact raised in a complaint which prays for a declaratory judgment of nonliability, otherwise triable by a jury, which complaint is filed in anticipation of a suit for damages, triable as of right to a jury, shall be tried to the Court, without a jury, over the objections of the opposite party, because the complaint also alleges threats of that damage suit and irreparable injury resulting therefrom.

2. Where the basic issues in a complaint seeking an injunction against a threatened jury trial for damages are in essence a defense to or a denial of issues in that im-

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<sup>1</sup>To avoid a completely abortive trial before the wrong trier of fact, United States Courts of Appeals, and this Court, have often permitted the use of extraordinary remedies:

*Bereslavsky v. Caffey* (2d Cir.), 161 F. 2d 499;  
*Bereslavsky v. Klobb* (6th Cir.), 162 F. 2d 862;  
*Canister Co. v. Leahy* (3d Cir.), 191 F. 2d 255;  
*United States Alkali Export Assoc. v. United States* (1944),  
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*Ex parte Simmons* (1917), 247 U. S. 231, 62 L. Ed. 1094;  
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*Norwood v. Kirkpatrick*, 349 U. S. 29, 99 L. Ed. 789, 75 S.  
 Ct. 544;  
*LaBuy v. Howes*, 352 U. S. 249, 1 L. Ed. 290.

pending action may a litigant be deprived of a jury trial as to those issues by their prior trial by the Court as a "claim in equity", or is such deprivation of jury trial forbidden by the Seventh Amendment to the Constitution and Rule 38 of the Federal Rules of Civil Procedure.

3. May a Federal Court under the Seventh Amendment to the Constitution, and Rule 38 of the Federal Rules of Civil Procedure, in a civil action involving joined or consolidated so-called "equitable" and so-called "legal" claims, which claims include common substantial questions of fact, deprive either party of a properly-demanded jury trial upon those substantial questions of fact by proceeding to a previous disposition of the claim denominated "equitable", and thus causing those facts to become *res judicata*.

### Statutes Involved.

The pertinent statutory provisions are printed in Appendix A, *infra*, page 1.

### Statement.

This action was commenced in the United States District Court for the Southern District of California by Fox West Coast Theatres Corporation, a Delaware Corporation.<sup>2</sup>

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<sup>2</sup>The real parties in interest are Fox West Coast Theatres Corp., hereinafter referred to as Fox West Coast, a Delaware corporation, and Pacific Drive-in Theatres, Inc., a California corporation; the respondent Hon. Harry C. Westover is Judge of the United States District Court of the Southern District of California, Central Division, who entered the orders giving rise to this petition.

**A. Legal Basis for Federal Jurisdiction Alleged in Complaint.**

The complaint entitled "Complaint for Declaratory Relief" alleged:

(a) That it was brought pursuant to the Federal Declaratory Judgment Act, Title 28, U. S. C. A., Sections 2201 and 2202, for the purpose of having the court declare the rights and obligations of the parties under the facts alleged in the complaint. [Complaint, R. 11.]

(b) That the matter in controversy arose under Sections 1 and 2 of the Sherman Act, which prohibit restraints of trade and monopoly, and under the private damage provisions of the Clayton Act which provide for a remedy in damages for private persons injured. (15 U. S. C. A., Secs. 1, 2, 15.) Diversity of citizenship and the statutory amount in controversy was also alleged. [Complaint, R. 11.]

**B. The Allegations in Support of the Claims for Declaratory Relief.**

The complaint alleged:

(a) That Fox West Coast and petitioner are owners of theatres in or near the City of San Bernardino, California; that Fox West Coast had for many years owned and operated the "California Theatre" in the City of San Bernardino; and that petitioner had recently constructed a drive-in theatre, the Belair Drive-in, some eleven miles away from the California Theatre. [Complaint, R. 15-16.]

(b) That in an action entitled *United States v. Paramount Pictures Inc., et al.*, Eq. No. 87-273 in the United States District Court for the Southern District of New York, brought by the United States against the major

distributors<sup>3</sup> in the United States, for violation of the antitrust laws, there were established judicial definitions as well as judicial restrictions on the use of "clearance" in the motion picture business. Clearance in the motion picture business, it was alleged was defined "as the period of time usually stipulated in license contracts which must elapse between runs of the same picture within a particular area or in specified theatres." [Complaint, R. 13.]

(c) That in that action, *United States v. Paramount Pictures, Inc., et al., supra*, decrees were entered against these designated distributors in which, among other things, said distributors were enjoined

"From granting any clearance between theatres not in substantial competition.

"From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonable and necessary to protect the licensee in the run granted."<sup>4</sup>

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<sup>3</sup>The distributors, as designated in the complaint in this action, included Paramount Pictures, Inc., RKO Pictures, Inc., Warner Bros. Pictures, Inc., 20th Century-Fox Film Corp., Columbia Pictures Corp., Universal Film Exchanges, Inc., Loew's, Inc., and United Artist Corp. [R. 11.] See *United States v. Paramount Pictures, Inc., et al.*, 66 Fed. Supp. 323, 334 U. S. 131, 85 Fed. Supp. 881.

<sup>4</sup>The complaint alleged that in the *Paramount* case, the decrees provided that the court retained jurisdiction "for the purpose of requiring any of the parties to this decree, and no others, to apply to the court at any time for such order or direction as may be necessary or proper for the construction, modification or carrying out of the same, for the enforcement or compliance whatever or for infringement for violations thereof or for other and further relief." [Complaint, R. 15.]

The complaint also alleged that in the opinion in the *Paramount* case, the court had stated that the decisions whether in any particular case unreasonable clearances have been or are being imposed and whether clearances as between theatres which are not in substantial competition to each other have been or are being imposed should be let to local suits in the area concerned. [Complaint, R. 14.]

## The Allegations of Opposing Contentions and Impending Legal Controversy.

It was alleged:

(a) That prior to filing the complaint, the designated distributors had licensed or offered to license to Fox West Coast for its California Theatre in San Bernardino, motion pictures distributed by them on *first run* in the San Bernardino competitive area and that they had therefore granted, after negotiation, to Fox West Coast, for said theatre, a reasonable period of *clearance* or protection before the same picture was licensed for subsequent run exhibition in said area; that the right to negotiate for first run and for clearance over subsequent exhibition was a valuable property right, the deprivation of which would result in a substantial amount of monetary damage and loss to Fox West Coast. [Complaint, pp. 15-16.]

(b) That petitioner had recently opened its drive-in theatre eleven miles from the Fox West Coast California Theatre, but it was alleged, within the San Bernardino competitive area.<sup>5</sup>

(c) That "an actual controversy relating to the legal rights and liabilities of plaintiff (Fox West Coast), and defendant (petitioner) exists and arises out of the following facts." These facts, it was alleged were:

(1) That petitioner contended that its new Belair Drive-in Theatre was *not* in substantial competition with Fox West Coast's California Theatre or with other theatres in that area, and that, therefore, petitioner contended that Fox West Coast was not en-

<sup>5</sup>It was also alleged that there were other theatres within twelve miles of the Fox West Coast Theatre which were also within the San Bernardino "competitive area." [Complaint, R. 16.]



titled to negotiate with the distributors for clearance in favor of the Fox West Coast Theatre over petitioner's Belair Drive-in; that petitioner contended that it was entitled, therefore, to exhibit motion pictures at the same time, i.e., simultaneously with Fox West Coast's California Theatre in San Bernardino, eleven miles distant. [R. 17.]

(2) That in conflict with these contentions by petitioner, Fox West Coast contended that its California Theatre in San Bernardino was substantially competitive with petitioner's newly constructed Belair Drive-in and that all other theatres in the area were mutually substantially competitive to an extent justifying the granting of clearance to one theatre over others within the purview of the opinion and findings of the special expediting court in *United States v. Paramount, et al.*; that consequently, the granting of clearance by the distributors would not be within the injunctive provisions against granting of any clearance to theatres not in substantial competition within the meaning of the consent decrees and final decrees in the *Paramount* case. [R. 17.]

(3) That Fox West Coast contended that it had an equal right with petitioner to negotiate with each distributor independently for a prior run for its theatre in San Bernardino ahead of any other theatre, including petitioner's Belair Drive-in, and that there was no obligation on the part of any distributor in such a case to grant an equal and simultaneous run to petitioner's Belair Drive-in Theatre. [R. 17.]

(4) That petitioner, in addition to contending that it was not in substantial competition with the other theatres, referred to by Fox West Coast, had threat-

ened Fox West Coast and had stated to Fox West Coast in "substance and effect" that it had threatened the distributors that "if plaintiff's (Fox West Coast) California Theatre is granted any clearance over defendant's Belair Theatre, or is granted a prior run, such action on the part of plaintiff (Fox West Coast) will be deemed by plaintiff (petitioner) to be an overt act in concert with any distributor who may grant plaintiff such clearance or prior run in restraint of trade and in violation of the Sherman Antitrust Act, and of the decrees of the Special Expediting Court in *United States v. Paramount Pictures, Inc., et al.*, and that plaintiff will be subjected to an action by petitioner for treble damages under Sec. 4 of the Clayton Act (Title 15 U. S. C. Sec. 15." [R. 17-18.]

(5) That "said" threats and duress and coercion upon the distributors arising out of and resulting from said threats of litigation threatened and had, in fact, deprived Fox West Coast of the right to negotiate for motion pictures upon first run and to negotiate for clearance over competitive theatres including petitioner's Belair Drive-in Theatre. [R. 18.]

(6) That Fox West Coast was without any speedy or adequate remedy at law and would be irreparably harmed unless the petitioner was restrained and enjoined from instituting any action under the anti-trust laws against plaintiff (Fox West Coast) and said distributors or any of them based upon the facts alleged, during the pendency of the action, and until such time as the court should determine whether or not the plaintiff and defendant had an equal and correlative right to license a prior run with clearance on behalf of their respective theatres. [R. 18.]

**D. The Prayer for Declaratory Relief.**

The complaint set forth its prayer for judgment. The prayer sought a declaration that:

1. The granting of clearance between theatres on first run in the San Bernardino competitive area, and particularly between Fox West Coast's California Theatre and petitioner's Belair Drive-in Theatre "is reasonable and is not in violation of the anti-trust laws or of the decrees of *U. S. vs. Paramount, et al.*"

2. That the distributors are and each of them is entitled to negotiate with Fox West Coast and petitioner and with the other owners and operators of theatres in said competitive area equally for a prior run in said competitive area.

3. That the court declare such other rights or duties as may be necessary or proper in respect to the controversy alleged.

4. That pending final decision of the court, petitioner, Beacon Theatres, Inc., be *restrained and enjoined "from commencing any action under the anti-trust laws of the United States against plaintiff (Fox West Coast) and against the distributors arising out of the facts or controversies alleged."*

The prayer then requested that the court give such other relief, equitable or otherwise, as the court deemed proper or necessary and then sought costs. [Complaint, R. 18-19.]<sup>6</sup>

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<sup>6</sup>Petitioner's motion to dismiss the complaint upon the grounds that said complaint was in excess of the jurisdiction of the Federal Courts because it did not show a case or controversy, as required by Article III, Sec. 2 of the Constitution of the United States, was denied on January 17, 1957. [R. 21.] Thereafter, the real party in interest, Pacific Drive-in Theatres, Inc., intervened as a defendant. [R. 22.]

**E. Proceedings Subsequent to the Filing of the Complaint.**

No action to obtain a *pendente lite* injunction against petitioner's filing of the antitrust case was taken by Fox West Coast. Thereafter, on February 18, 1957, as anticipated by the complaint, petitioner filed its answer, affirmative defense and counterclaim, in which it sought damages under Title 15 U. S. C. 15 for damage to its business resulting from violations of the antitrust laws. Petitioner's pleading alleged:

(a) that petitioner's Belair Drive-in Theatre was not in substantial competition with any of the theatres of Fox West Coast [R. 39];

(b) that Fox West Coast and Pacific Drive-in Theatres Corporation, and certain other designated corporations, were engaged in a combination conspiracy to restrain and monopolize the exhibition of motion pictures in the San Bernardino area [R. 39];

(c) that said parties had agreed, pursuant to that conspiracy, to prevent Petitioner's Belair Theatre from obtaining the privilege of exhibiting motion pictures on a first-run availability, simultaneously with the exhibition of said motion pictures in the theatres of Fox West Coast, Pacific Drive-in and others [R. 40];

(d) that the continued granting of clearance to Fox West Coast over Petitioner's Drive-in Theatre, and the prevention of Petitioner's Belair Theatre, from exhibiting motion pictures simultaneously with the theatres of Fox West Coast and others, was a practice carried on pursuant to and part of a conspiracy to restrain the business of Petitioner in operating the Belair Drive-in Theatre. [R. 40.]

Petitioner, pursuant to Rule 38 of the Federal Rules of Civil Procedure, filed and served a timely demand for jury trial as to all issues of the complaint, answer and counterclaim. [R. 43.]

On motion of Fox West Coast, and over the objection of petitioner, the respondent, on March 21, 1957, entered an order

- (a) striking Petitioner's Demand for Jury Trial as to the complaint and answer;
- (b) striking the portions of Petitioner's answer and affirmative defense relating to antitrust violations by Fox West Coast;
- (c) directing that trial be held by the court alone on all of the issues in the complaint, including the issues in the complaint which were common to Petitioner's antitrust defenses and counterclaim, and that only after such trial that Petitioner be permitted to try the remaining issues set forth in the counterclaim to a jury. [R. 51.]

After the entry of this order, Petitioner filed an original application in the Court of Appeals seeking a Writ of Mandamus directed to the respondent Judge, requiring him to enter an order dismissing the complaint as being in excess of the jurisdiction of the United States District Court or, in the alternative, to vacate the order described above and to enter an order directing respondent to proceed with the jury trial of all issues of the complaint, answer and counterclaim triable to a jury, prior to or simultaneously with the trial by the court of any issues properly triable by the court alone.<sup>7</sup>

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<sup>7</sup>This is the procedure approved and required by Judge Stanley Barnes, dissenting in *Institutional Drug Distributors v. Yankwich* (C. C. A. 9, 1957), 249 F. 2d 566, 571.



In its petition to the Court of Appeals, Petitioner alleged the facts hereinbefore described. Petitioner alleged that respondent's order striking petitioner's demand for jury trial as to the complaint and answer, striking the nitritrust defenses of petitioner's answer, and ordering trial without jury of the complaint, before the trial of the issues in the counterclaim, unlawfully deprived petitioner of his right to jury trial under the Seventh Amendment to the Constitution of the United States, and Rules 38 and 57 of the Federal Rules of Civil Procedure of the following matters, at least, raised by the complaint:

(a) The existence of substantial competition between Petitioner's Belair Drive-in Theatre and Fox West Coast's California Theatre;

(b) The existence of unreasonable clearance between said theatres;

(c) The relative desirability of said theatres to distributors of motion pictures as outlets for first run, feature motion pictures;

(d) Whether in fact requests were made by theatres for first run availability and clearance from the various motion picture distributors.

Petitioner alleged that under the principles of estoppel or *res adjudicata*, a prior determination by the trial court without a jury would bar a subsequent jury determination of these common issues, and that, therefore, a respondent's order striking its jury demand and directing the prior court trial of the common issues unlawfully deprived petitioner of its right to jury trial of its counterclaim. The Petition for Writ of Mandamus also asserted that jurisdiction of the subject matter was lacking.<sup>8</sup> [R. 1.]

<sup>8</sup>In the Court of Appeals, respondent filed a response. As stated by the Court of Appeals, no issue of fact with respect to the petition of Writ of Mandamus was raised by the respondent. [R. 108.]

The Court of Appeals determined certain questions of law adversely to petitioner, which questions of law will be hereinafter described, and then held that it did not reach the question of the issuance of the Writ of Mandamus and denied the petition. [R. 125.]

### The Opinion of the Court of Appeals.

In its opinion, the Court of Appeals laid down rules relating to the interpretation of the Seventh Amendment, and Rules 57, 38, 42, and 18 of the Federal Rules of Civil Procedure, which have great impact upon the administration of these provisions of law in the Federal courts.

1. The Court held that although a litigant cannot be deprived of a right to jury trial as to substantial issues by the device of a prospective defendant filing a suit for declaratory judgment raising those issues, by reason of Rule 57 of the Rules of Civil Procedure, and the Seventh Amendment, that result can be accomplished if the complaint for declaratory judgment adds allegations of threats of litigation and irreparable injury arising therefrom. Thereby, the Court held, the complaint for declaratory judgment is converted into an "action in equity for an injunction against threats of litigation." Thereafter, the trial court has discretion to order that equity trial first under Rule 42(b) of the Federal Rules of Civil Procedure.

2. The Court held that Rule 42(b) of the Federal Rules of Civil Procedure gives the Federal Court a right to apply this procedure of preemption to a complaint seeking an injunction against threatened jury trial actions for damages even where the complaint is in essence nothing more than a defense to or denial of issues in that impending action.

3. The Court held that in a civil action involving a claim which, before the Federal Rules, would have been denominated a bill in equity, which claim is joined or consolidated with a claim which, before the Federal Rules, would have been denominated a suit at law, both claims including common substantial questions of fact, the Federal Court has discretion to deprive either party of a properly demanded jury trial upon that common question of fact by proceeding, under Rule 42(b), to a previous disposition of the so-called equitable claim, and so causing that fact to become *res judicata*. The Court held that this result could be attained under Rule 42(b) even in a case in which the so-called "equitable" claim was for a declaration of nonliability and an injunction against the filing of the legal claim. The Court further held that under the Federal Rules of Civil Procedure, Rule 42(b), may be applied, without limitation by or consideration of the right to a jury trial under the Seventh Amendment, or as guaranteed by Rule 38(a) of the Rules of Civil Procedure.

### Summary of the Argument.

A fair analysis of the Complaint, based upon its express allegations and its prayer, clearly establishes that it was a complaint seeking a determination of nonliability under the antitrust laws and was in the nature of a suit for Declaratory Judgment. The complaint alleged that Fox West Coast contended it had an absolute right to negotiate for an exclusive run and clearance over petitioner's theatre, eleven miles away, in the same manner as it, Fox West Coast, had obtained an exclusive run and clearance over other theatres for many years theretofore. The complaint alleged that petitioner contended that if the dis-

tributors of motion pictures granted an exclusive run and clearance to Fox West Coast over petitioner's theatre, that such exclusive run and clearance would violate the anti-trust laws as an unreasonable restraint of trade because the theatres were not in substantial competition with each other. The complaint alleged that petitioner desired to exhibit pictures simultaneously with Fox West Coast. It was this dispute, the complaint alleged, which formed the basis of the complaint for Declaratory Judgment. The complaint alleged that petitioner had warned of an anti-trust damage suit by reason of its belief that contracts for an exclusive run and clearance over theatres not in substantial competition constituted an unreasonable restraint of trade. These allegations in the complaint were necessary to the complaint in order to show a "case or controversy" within the meaning of Article Three of the Constitution of the United States.

As a party to a suit for Declaratory Relief, filed in anticipation of and as a substitute for a suit for damages under the antitrust laws, petitioner was entitled to have the issues tried to a jury in the same way as the antitrust damage suit would have been tried to a jury.

The lower court's ruling that the allegations of the complaint were analogous to a suit to enjoin threats of legal action was erroneous since historically such a bill in equity required positive affirmative allegations showing that the threats were made by one who did not intend to test his right in court. The complaint affirmatively shows that petitioner was anxious to test its claim in court.

but that it was Fox West Coast who sought to enjoin such a test. The allegations of dispute and controversy as to the existence or non-existence of substantial competition affirmatively show the existence of good faith with respect to petitioner's claims.

Whether considered as a complaint for Declaratory Relief or as a complaint to enjoin a suit at law, the adjudication sought and directed by the courts below was an adjudication as to the liability or nonliability of Fox West Coast under the antitrust laws. As part of petitioner's counter claim, these same issues are raised for determination by a jury. The basic issues are, therefore, issues triable to a jury. Rule 42(b) permits the trial court to separate these issues for trial. The jury can be required to try separately those issues which should be tried separately in the interest of justice. Equitable issues, if any, may be tried to the court, but in this case Rule 42(b) cannot be converted into a technique for destroying petitioner's right of trial by jury by labeling all of the issues in the complaint as equitable and preempting the trial of those issues by the court alone. The importance of the policy represented by the Seventh Amendment precludes this result.



## ARGUMENT.

### A.

**A Suit for Declaratory Judgment, Which Is Filed in Anticipation of and as a Substitute for a Suit for Damages Under the Antitrust Laws, Wherein a Litigant Would Have a Right to Jury Trial Is Triable to a Jury, Upon Demand, Under the Seventh Amendment to the Constitution of the United States and Rule 57 of the Federal Rules of Civil Procedure.**

This Court has not yet had occasion to determine the principles of law applicable to the decision of the mode of trial in declaratory judgment actions. In *Aetna Life Insurance v. Haworth*, 300 U. S. 227, that question was not presented for decision, and this Court, therefore, left it unanswered.

Even before the adoption of the Federal Rules of Civil Procedure, and particularly before the adoption of Rule 57 thereof, it was agreed that a suit for declaratory judgment was neither "legal" nor "equitable." It is a procedural "neutral" in the family of remedies. When originally adopted, the Federal Declaratory Judgment Act stated: "When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not." (*Federal Declaratory Judgment Act* (Act of June 14, 1934, 48 Stat. at Large 955; Chap. 912) Judicial Code, Sec. 274D.; 28 U. S. C., Sec. 400.) The

Judicial Code of 1948 did not carry forward the above provision, but the revisors notes to new Section 2202 of Title 28 state that:

"Provisions relating to submission of interrogatories to a jury were omitted as covered by Rule 57 of the Federal Rules of Civil Procedure."

Rule 57 states: "The right to jury trial may be demanded under the circumstances and in the manner provided by Rules 38 and 39." Rule 38 declares that "the right of trial by jury as declared by the Seventh Amendment of the Constitution, or as given by a statute of the United States, shall be preserved to the parties inviolate." This statutory chain demonstrates a neutrality with respect to right of jury trial in declaratory judgment actions in order to permit the full development of this important procedural remedy within the framework of our Constitutional system.

It should be noted that 28 U. S. C. 400 clearly anticipated that there might be actions for declaratory relief wherein separate issues of fact would be triable by jury, while other facts might be triable by the Court. This Court has recognized that this is the correct analysis in all actions under the Federal Rules. (*United States v. Yellow Cab*, 340 U. S. 543, 556.)

The Courts have, however, uniformly agreed that a prospective defendant may not employ this procedural device to anticipate actions for which a jury trial would have been granted by filing such a declaratory relief suit and then arguing that the action is essentially an "equitable" one, and thereby destroying the right of jury trial. Had prospective defendants met with success in this area, doubtless this Court would have long since found the

Seventh Amendment to be an impenetrable bar to such easy destruction of the right of jury trial. The prospective defendant, Professor Borchard notes, cannot defeat the right of jury trial by rushing into court with an action for declaratory judgment.<sup>9</sup>

The proceedings below, and particularly, the complaint itself, attempted to make use of the declaratory judgment procedure. The complaint asserts that it is a complaint for declaratory judgment. [R. 10.] It alleges that it is brought pursuant to the Federal Declaratory Judgment Act to have the Court declare the rights and obligations of the parties under the facts set forth. [R. 11.] It alleges facts showing that the parties differed in their claims as to the existence or non-existence of substantial competition between their theatres and differed as to their opinion as to whether or not the granting of clearance between their theatres would constitute a violation of the antitrust laws or would constitute a contempt of the decree in the *Paramount* case. [R. 16-17.]

All of these allegations are contained in Paragraphs I through XI of the complaint. It is obvious, of course, that had the complaint stopped there, it would have been subject to a most apparent deficiency under the Constitution of the United States. A claim that two theatre owners who have no other relationship to each other except that they operate within 11 miles of each other, and differ in their contentions as to whether they are competitive or whether certain action by third parties, i.e., distributors, would constitute a contempt of another court's decree or would constitute a violation of the antitrust laws could not stand muster under the "case or controversy" require-

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<sup>9</sup> Borchard, *Declaratory Judgments*, p. 400.

ment of Article III of the Constitution under the most friendly application of that limitation.<sup>10</sup> Such facts could not constitute a sufficient claim of right to create a legal case or controversy justifying judicial action. Only the Attorney General may seek a remedy by way of contempt in the United States District Court for the Southern District of New York. A claim by petitioner to the distributors of motion pictures that the distributors' action constituted a contempt, would surely be a claim both useless and frivolous. Even more clearly, a claim by the petitioner that action which might be taken by the distributors constituted a violation of the antitrust laws would be utterly unenforceable by the petitioner, since the United States alone may enforce the antitrust laws. Thus, had the complaint stopped at Paragraph XI, it must surely have been dismissed.

In examining Paragraph XII of the complaint, it is therefore crucial to recognize that in a Declaratory Relief suit, wherein the declaration sought is, as here, a declaration of nonliability, some claim of right is essential.<sup>11</sup> There can be no doubt that the pleading here sought only such a declaration. It specifically requested a declaration that an exclusive first run and clearance would not violate the equity decree in the *Paramount* case, and would not violate the antitrust laws. [R. 18-19.] The request that the Court declare that third parties, i.e., distributors, had the right to license an exclusive first run with clearance is simply flipping the procedural coin which upon its face requests a declaration of nonliability. Thus the allegations

<sup>10</sup>Borchard, *Declaratory Judgments*, 2d Ed., p. 400.

<sup>11</sup>Borchard, *Declaratory Judgments*, p. 43; *Dewey and Almy v. Chemical Corp. of America* (C. C. A. 3, 1943); *Arlac v. Hat Corporation of America* (C. C. A. 3, 1948), 166 F. 2d 286.

of threats of a damage suit in Paragraph XII were precisely for the purpose of meeting the "case or controversy" test of Article III of the Constitution.

Of course, this Court has long held that an action for Declaratory Relief does not require allegations of irreparable injury or inadequacy of legal remedy. (*Aetna Life Ins. v. Haworth*, 300 U. S. 227; Borchard, *Declaratory Judgment*, p. 239.) Those allegations, in Paragraph XII, were, therefore, surplusage in so far as declaratory relief was called for. The complaint was nothing less and nothing more than a complaint for declaratory judgment.

The courts have generally recognized and upheld the right to jury trial in declaratory relief actions as to those issues in regard to which either party could have claimed a jury in any action for which the declaratory judgment may be regarded as a substitute. The cases in point are cited in the margin.<sup>12</sup>

The complaint shows that Fox West Coast anticipated petitioner's suit for damages under the antitrust laws. The proof is in the express language of Paragraph XII. It says:

"The defendant, in addition to contending that its said Bel Air Drive-In Theatre is not substantially

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<sup>12</sup>*Aetna Cas. & Surety Co. v. Quarles* (C. A. 4th S. C., 1937.), 92 F. 2d 321; *Maryland Cas. Co. v. Sammons* (C. A. 5th Ga., 1938), 99 F. 2d 323, cert. den. 306 U. S. 633, 83 L. Ed. 1035, 59 S. Ct. 463; *United States Fidelity & G. Co. v. Koch* (C. A. 3d Pa., 1939), 102 F. 2d 288; *Pacific Indem. Co. v. McDonald* (C. A. 9th Or., 1939), 107 F. 2d 446, 131 A. L. R. 208; (*American*) *Lumbermens Mut. Cas. Co. v. Timms & Howard* (C. A. 2d N. Y., 1939), 108 F. 2d 497; *Great Northern L. Ins. Co. v. Vince* (C. A. 6th Mich., 1941), 118 F. 2d 232, cert. den. 314 U. S. 637, 86 L. Ed. 511, 62 S. Ct. 71; *Beunit Mills, Inc. v. Eday Fabric Sales Corp.* (C. A. 2d N. Y., 1942), 124 F. 2d 563; *Hargrove v. American Cent. Ins. Co.* (C. A. 10th Okla., 1942), 125 F. 2d 225; *Williams v. Employers Mut. Liability Ins. Co.* (C. A. 5th Ala., 1942), 131 F. 2d



competitive with any other theatre in the San Bernardino area on first run exhibition in said area, has threatened plaintiff and has stated to plaintiff in substance and effect that it has threatened the distributors, above mentioned, that if plaintiff's said California Theatre is granted any clearance over defendant's Bel Air Drive-In Theatre, or was granted a prior run, said action on the part of plaintiff would be deemed by defendant to be an overt act in concert with any distributor who may grant such clearance or such priority of run in restraint of trade and a violation of the Sherman Anti-Trust Act and of the decrees of the Special Expediting Court in the *United States v. Paramount Pictures, Inc., et al.*, and that plaintiff would be subjected to an action by said defendant for treble damages under Section 4 of the Clayton Act. (Title 15, U. S. C. Sec. 15.)" [R. 17-18.]

Fox West Coast sought to forestall this suit for damages at law under the antitrust laws by its suit for declaratory judgment. The proof is in the prayer which says:

"That pending final decision of the Court herein, defendant, Bacon Theatres, Inc., and its officers, agents and employees, be restrained and enjoined from commencing any action under the antitrust laws

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601; *Piedmont F. Ins. Co. v. Aaron* (C. A. 4th Va., 1943), 138 F. 2d 732, cert. den., 321 U. S. 789, 88 L. Ed. 1079, 64 S. Ct. 789; *Dickinson v. General Acci. F. & L. Assur. Corp.* (C. A. 9th Cal., 1945), 147 F. 2d 396; *General Acci. F. & L. Assur. Corp. v. Schero* (C. A. 5th Fla., 1945), 151 F. 2d 825; *Lumber Mut. Cas. Ins. Co. v. Stukes* (C. A. 4th S. C., 1947), 164 F. 2d 571; *United States Fidelity & G. Co. v. Nauer* (D. C. Mass., 1941), 1 F. R. D. 547; *Eastman Kodak Co. v. McAuley* (D. C. N. Y., 1941), 2 F. R. D. 21; *Allstate Ins. Co. v. Cross* (D. C. Pa., 1941), 2 F. R. D. 120; *Ryan Distributing Corp. v. Caley* (D. C. Pa., 1943), 51 Fed. Supp. 377; *United States Fidelity & G. Co. v. Janich* (D. C. Cal., 1943), 3 F. R. D. 16; *Binger v. Unger* (D. C. N. Y., 1946), 7 F. R. D. 121; *North American Philips Co. v. Browenshield* (D. C. N. Y., 1949), 9 F. R. D. 132.

of the United States against plaintiff and against the distributors hereinabove named, or any of them, arising out of the facts or controversies between the parties herein alleged." [R. 18.]

It has been long established that an action for damages under the Sherman Act, upon timely demand, is triable by a jury.

*Fleitman v. Wellsbach Street Lighting Co. of America*, 240 U. S. 27, 36 S. Ct. 233, 60 L. Ed. 505;

*Cf. Bigelow v. RKO Radio Pictures*, 327 U. S. 251, 254, 66 S. Ct. 574, 90 L. Ed. 632.

Such actions for damages in the motion picture industry cases, almost without exception, involve, among other issues, the factual issues of (a) substantial competition; (b) unreasonable clearance; (c) comparability of theatres; and (d) demand for disputed runs. Where a jury has been demanded, all of these issues have been jury issues in the damage cases under the Sherman Act.

*J. J. Theatres, Inc. v. 20th Century-Fox Film Corp.* (C. C. A. 2nd), 212 F. 2d 840 (re issue of substantial completion);

*20th Century-Fox Film Corporation v. Brookside Theatre Corp.*, 194 F. 2d 846 (re issue of unreasonable clearance);

*Loew's, Inc. v. Milwaukee Town Corp.*, 201 F. 2d 19 (re issues of demand and comparability of theatres, jury apparently waived).

Thus, it is apparent that the complaint for declaratory relief and the motion to strike petitioner's demand for jury trial by Fox West Coast, were a patent attempt to avoid a trial by jury which, however, is unavailing to Fox West Coast by reason of the foregoing principles of law.

B.

**A Complaint for Declaratory Relief Which Also Seeks an Injunction Against Threats of Litigation Is Triable to a Jury. Prior to the Adoption of the Federal Rules, the Complaint Herein, as a Bill in Equity, Would Have Been Dismissed Since It Failed to Show That Petitioner Did Not Intend to Follow Up the Threats With a Test of His Right in Court. Moreover, After the Filing of the Counter Claim, the Remedy at Law Was Adequate.**

The Court below in analyzing the complaint for declaratory judgment, fell into error when it held that the allegations of Paragraph XII of the complaint converted what was otherwise clearly an action for declaratory judgment into an action to enjoin threats of a damage suit which, prior to the Rules, would have been, the Court said, "A suit within the exclusive jurisdiction of a Court of Equity." [R. 123.] The unwillingness of the Court to recognize the overwhelming declaratory relief thrust of the allegations of the complaint and the prayer for final relief, is apparent from its opinion. In fact, to convert the character of the complaint, the Court was even willing to "assume" that the complaint sought an injunction against threats of litigation which were nowhere pleaded; and was willing to amend the complaint on the appeal, to include allegations that petitioner threatened the distributors with an antitrust case when, again, no such allegations appear in the complaint. [R. 112, footnote 6.] But even with this assumption and amendment, the complaint failed to state a claim which would have been cognizable "in equity".

An equitable claim was not stated because the complaint failed to allege that the threats of a damage suit

were made without the intent to follow with an actual suit in the courts. Further, the complaint affirmatively demonstrated that petitioner was anxious to sue, and that Fox West Coast sought to prevent the test of petitioner's antitrust suit.

In the area of equitable relief, it was established long before 1938 that

"It is not an actionable wrong when one in good faith makes complaint to whoever he will that it is his purpose to insist upon what he believes to be his legal rights, even though he may misconceive what those rights are."

*Eastern Petroleum Co., Inc. v. Asiatic Petroleum Corp.* (2 Cir.), 103 F. 2d 315.

The rule is well illustrated in patent cases. In *Virtue v. Creamery Package Mfg. Co.* (C. C. A. 8, 1910), 197 Fed. 115, it was urged that a threat of a patent infringement suit which interfered with a third party's interest, gave rise to an actionable claim. The Court of Appeals held:

"That the owner of a patent may notify infringers of its claims, and warn them unless they desist, suits will be brought to protect him and his legal rights, is sustained by numerous decisions. *Kelley v. Ypsilanti Press Stay Mfg. Co.* (C. C.), 44 Fed. 19, 10 L.R.A. 686; *Computing Scale Co. v. National Computing Scale Co.* (C. C.), 79 Fed. 962; *Farquhar Co. v. National Harrow Co.*, 102 Fed. 714, 42 C. C. A. 600, 48 L. R. A. 755; *Adrienne Platt & Co. v. National Harrow Co.*, 121 Fed. 827, 58 C. C. A. 163; *Warren Featherbone Co. v. Landauer* (C. C.), 151 Fed. 130; *Mitchell v. International, Etc., Co.* (C. C.), 169 Fed. 145, Thirty Cyc. 1054.

"The only limitation to issue such warnings is the requirement of good faith. There is nothing in the warnings given in this case to show that letters of warnings were false, malicious, offensive, opprobrious, or that they were used for the willful purpose of inflicting injury. In such a case, it was said in *Kelley v. Ypsilanti, supra*:

"It would seem to be an act of prudence, if not of kindness, upon the part of the patentee, to notify the public of his invention, and to warn persons dealing in the article of the consequence of purchasing from others. *Chase v. Tuttle* (C. C.), 27 Fed. 110; *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69 (19 A. R. P. 310); *Kidd v. Horry*, 28 Fed. 773.

"There is nothing in this case to indicate that any of the warnings issued by the defendants were made in bad faith, and that they were not promptly followed by the institution of the infringement suits. In issuing notices and warnings, we think the defendants were acting within their legal rights. If they had the right to bring the suits, they had the right to issue the warnings. It may be, and probably is, true that the tendency of these suits resulted in some damage to the plaintiffs in lessening the sale of the challenged device; but such damage was an incident of the suits, and cannot be made the basis of a recovery."

The decree of the Court of Appeals was affirmed in this Court, in *Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8, 37-38, where the Court said:

"Patents would be of little value if infringers of them could not be notified of the consequence of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal."



Indeed, in the early case of *Kidd v. Horry*, 28 Fed. 773, Justice Bradley had before him this question:

"We are asked to grant injunction in this case to restrain the defendants from publishing certain circular letters which are alleged to be libelous and injurious to the patent right and business of the complainants, and from making and uttering libelous or slanderous statements, written or oral, of or concerning the business of the complainants or concerning the validity of their letters patent, or of their title thereto, pending the trial and adjudication of the principal suit, which is brought to restrain the infringement of said patents."

Justice Bradley denied the injunction. He held that on the basis of statutory changes in the law of England that such an injunction might issue out of courts in that country, but he said:

"Neither the statutory law of this country, nor any well-considered judgment of the courts, has introduced this new branch of equity into our jurisprudence."

Justice Bradley went further. He stated that "the law was clearly that the Court of Chancery will not interfere by injunction, to restrain the publication of a libel," as was distinctly laid down by Lord Chancellor Cairns in the case of *Prudential Insurance Co. v. Knott*, 10 Chancery Appeals 142, where he says, in reference to the application of an injunction to restrain a libel, calculated to injure property:

"Not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction."

The rule of law wherein Courts of Equity had no power to issue injunctions against threats of suits at law unless there were positive, affirmative, allegations of fact showing the unwillingness to sue, is even more clearly demonstrated by the leading case of *Emack v. Kane*, 34 Fed. 46. There, the Court granted an injunction because of the presence of such allegations, and distinguished *Kidd v. Harry*, *supra*, by holding that the gravamen of the action in the *Emack* case was an attempted intimidation of the complainant's customers by threatened suits *which defendants did not intend to prosecute*. In a case involving a counterclaim which sought a declaration of patent invalidity and also alleged threats of litigation by the patentee resulting in damage, Judge Learned Hand held that, although the complaint sought an injunction against threats to the counter-claimant's customers, such threats did not change the nature of the claim from a suit for Declaratory Relief to an injunctive suit. Judge Hand said: "Such threats gave rise to a cause of action only in case the party refuses to test his right in court."

*Leach v. Ross Heating & Mfg. Co.* (C. C. A. 2, 1931), 104 F. 2d 88.

The allegations in the instant complaint, of course, demonstrate that it was *petitioner* who was anxious to test its right to make the antitrust claims in court, and it was *Fox West Coast* whose desire it was to preclude such a test. Further, the good faith of petitioner's claim is affirmatively demonstrated by the complaint itself, when it alleges that the parties are in dispute as to whether their theatres are in substantial competition. The fact the theatres were eleven miles apart certainly, as a matter

of common sense, provides reasonable foundation for petitioner's claim.<sup>13</sup>

But the deficiency in the complaint, as an equitable claim, is even more complete. The Court below assumed that had petitioner's counterclaim been filed prior to the filing of the complaint, Fox West Coast in any event would have had an adequate remedy at law by denying and defending the allegations in petitioner's antitrust suit. The Court held that the filing of the counterclaim 90 days later did not make the remedy adequate, as a matter of law; because, the Court ruled, under all circumstances, adequacy must be tested at the time of the filing of a complaint. In this holding, the Court was in clear error.

It was well established by the decisions of this court prior to the adoption of the Federal Rules of Civil Procedure that when a defense could be interposed to an action at law and such action was *imminent* or pending, there was no occasion for equitable relief and the parties were left to their rights at law. In such a case, the bill was dismissed without prejudice, not because there was a want of jurisdiction in the Federal Court, but because the plaintiff had made no case for equitable relief.

In *Phoenix Mutual Life Ins. Co. v. Bailey* (1871), 13 Wall. 616, 80 U. S. 616, 20 L. Ed. 501, an insurer sued to cancel policies for fraud. An action at law later was

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<sup>13</sup>The lack of good faith on the part of Fox West Coast can best be demonstrated by the fact that this suit for declaratory judgment was filed; and the charge of irreparable injury made, before such a charge could possibly have been proven. The complaint was filed on November 2, 1956. The allegation is admitted that petitioner's theatre was opened during the month of November. [R. 39.] Thus, on the face of the pleadings, Fox West Coast would have had exactly one day's experience with the results of actual exhibition in order to substantiate its claim of "irreparable injury."

begun to recover on them. This court's decision sustained dismissal of the bill, because the insurer had a complete remedy by way of defense in the action at law and the claimant on the policy had a right to trial by jury. See also, to the same effect: *Adamos v. N. Y. Life Ins. Co.* (1935), 293 U. S. 386, 55 S. Ct. 315, 79 L. Ed. 444; *Enlow v. N. Y. Life Ins. Co.* (1935), 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440; *Cable v. U. S. Life Ins. Co.* (1903), 191 U. S. 288, 24 S. Ct. 74, 48 L. Ed. 188.)

Thus, in *Di Giovanni v. Camden Fire Insurance Association*, 296 U. S. 64, 80 L. Ed 47, this Court said:

"While equity may afford relief quia timet by way of cancellation of a document if there is a danger that the defense to an action at law upon it may be lost or prejudiced no such danger is apparent where, as respondent's bill affirmatively shows, the loss has occurred and suits at law on the policies are imminent and there is no showing that the defense cannot be set up and litigated as readily in a suit at law as in equity. . . . the grounds for relief for a single plaintiff which will deprive two or more defendants of their right to a jury trial must be real and substantial and its necessity must affirmatively appear (citing cases). Respondent's bill of complaint does not show that petitioners are unwilling to abide the result of a trial of one suit as controlling both."

And after the adoption of the Federal Rules of Civil Procedure, this court's ruling in these cases was continued. (*Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U. S. 563, 59 S. Ct. 657, 661, 83 L. Ed. 987; *Ettleson v. Metropolitan Life Ins. Co.*, 317 U. S. 188, 63 S. Ct. 163, 87 L. Ed. 170. See also *Prudential Insurance v. Saxe*, 134 F. 2d 16.)

C.

Where an Action Involves Separate Trials One by the Court and One by the Jury, and Common Basic Issues of Fact Exists, the Right to Jury Trial Under the Seventh Amendment May Not Be Defeated by the Prior Trial by the Court of These Common Basic Issues. Rule 42(b) of the Federal Rules of Civil Procedure Neither Requires nor Permits This Result.

In *Leimer v. Woods*, 196 F. 2d 828, the Court of Appeals for the Eighth Circuit held that in an action involving joined or consolidated equitable and legal causes of action, involving a common substantial question of fact, a Federal Court could not, under the Rules of Civil Procedure and the Seventh Amendment, deprive either party of a properly demanded jury trial upon that question by proceeding to a previous disposition of the equitable cause of action and so cause the fact to become *res judicata*, except for special or impelling reasons which would overcome basic constitutional procedural rights. In *General Motor's Corp. v. California Research Corp.*, 9 F. R. D. 965, in an action in which the plaintiff sought a declaratory judgment and an injunction restraining the bringing or the threatening of suits at law and defendant filed a counterclaim for damages, the court held that since the basic issues were legal issues, such basic issues formerly triable as of right by a jury were still triable by a jury as a matter of right.<sup>14</sup>

<sup>14</sup>This was the view of the Court of Appeals for the 9th Circuit prior to *Tanimura supra*. In *Bruckman v. Holzer* (C. C. A. 9, 1946), 152 F. 2d 730, Chief Judge Denman held that where common substantial issues are raised in claims formerly denominated legal and equitable, that the preservation of the right to jury trial, guaranteed by Rule 38A, and the Seventh Amendment, require



See also *Ryan Distributing Corp. v. Caley*, 51 Fed. Supp. 377.

The result of the ruling in the *Beacon* case is that the basic right to jury trial of common substantial issues is lost when equitable rights are also in the case. The ruling in the *Beacon* case holds that it is the exercise of the court's discretion under Rule 42b which controls the right of jury trial. Moreover, in the exercise of this discretion, the constitutional right to jury trial as to legal issues, is neither a controlling, nor even a relevant factor. This is in direct conflict with the decision in *Leimer v. Woods*, *supra*, with *General Motors Corp. v. Calif. Research Corp.*, *supra*, and is certainly in conflict in principle with the high place given to the right of jury trial by this court.

The construction of the Rules of Civil Procedure in the *Beacon* case conflicts with the enabling act, pursuant to which this Court promulgated, and the Congress adopted, the Rules of Civil Procedure. The Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. Sec. 723c, in granting the power to this court to prescribe rules of procedure, stated in part,—“Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.” If the rules are constructed to give to the courts the discretion to deny jury trial where, before the Rules, there was a right to such a trial, the substantive rights of litigants are clearly abridged. (Appendix A, p. 2.)

Similarly, in this manner, there is abridgment of the express provisions in the above designated statute,—“that

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the jury trial to be tried and determined first. This earlier opinion, cited with approval by many other circuit courts, is now disapproved by the *Beacon* decision. Professor Moore's views are in accord with the *General Motors* case, and the *Bruckman* case. (5 Moore Federal Practice (2d Ed.) pp. 148-158.)

in such union of rules, the right of trial by jury as at common law, and declared by the Seventh Amendment, that the Constitution shall be preserved to the parties inviolate." (Appendix A, p. 3.)

It should be noted that the Federal Rules, in many instances require all claims for relief, whether formerly denominated legal or equitable, or whether available as a claim or counterclaim, or cross-claim to be filed in the same action. The requirement is enforced by loss of the claim, if it is not tendered in the same action. In other instances, where *res judicata* principles are not applicable, the policy of the rule is expressly to encourage all claims by the diverse parties to be litigated in a single action.<sup>15</sup> But, the result of the *Beacon* decision is that if a litigant voluntarily or by compulsion files legal claims where the action also involves equitable claims, his right to jury trial is automatically lost. The litigant is thereafter subject to orders under Rule 42b, which are limited only by the court's discretion. Such a construction of the Federal Rules of Civil Procedure conflicts with the Enabling Statute cited *supra* and should be corrected by this Court.

It needs no demonstration to prove that important public policies are carried out through legislation which often provides for both legal and equitable remedies. As a re-

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<sup>15</sup>Rule 8a permits relief in the alternative or of several different types to be demanded. Rule 12b requires every defense to be asserted in the responsive pleading. Rule 13a requires the pleading of any counterclaim which a party has arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. Rule 13b permits counterclaims against the opposing party without reference to the transaction or occurrence embodied in the claim. Rule 13g permits cross-claims against co-parties and rule 13h permits additional parties to be brought in. Rule 42a permits consolidation of actions although separately filed where such actions involved a common question of law or fact. (Appendix A, pp. 3-6.)

sult of the *Beacon* decision, the right to jury trial in such matters is uncertain, and the enforcement of those public policies are therefore uncertain.

As an example, the courts have long acknowledged that a litigant who seeks damages and an injunction in an antitrust case, does not waive the right to trial by jury. In *Ring v. Spina* (C. C. A. 2, 1948), 166 F. 2d 546, it was argued that the joinder of legal and equitable claims in the same action resulted in a waiver of the right to jury trial as a matter of law by analogy with the old equity rules wherein a joinder of legal and equitable claim resulted in such a waiver. The court rejected that contention. It held that this Court's opinion in *Fleitman v. Welsbach Street Lighting Co. of America*, 240 U. S. 27, 36 S. Ct. 233, 60 L. Ed. 505, established that a claim for damages under the antitrust laws is triable as of right by jury. The decision in the *Beacon* case now holds that this right to jury trial is lost; that if the court determines to try the antitrust issues under the equitable claim for an injunction first that Rule 42b provides the source of such power even though the effect is to destroy the right of jury trial which this Court in *Fleitman v. Welsbach Street Lighting Co. of America*, *supra*, acknowledged.

Legal and equitable remedies are made available jointly in many fields of public interest in addition to the field of antitrust enforcement. The ruling in the *Beacon* case makes the availability of such remedies, when they are sought in the same case, discretionary with the court through the simple device of pre-emption of trial under Rule 42b.<sup>16</sup>

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<sup>16</sup>See Note, "Denial of Jury Trial By the Joinder of Legal and Equitable Claims," 39 Iowa L. Rev. 350.

It is submitted that Rule 42b cannot be construed in this manner nor can it be applied in this case to destroy the right of jury trial. In the instant case, as has been argued above, the basic issues raised by the complaint were related to the requested adjudication that Fox West Coast was not violating the antitrust laws. The prayer for this adjudication was based upon contentions that the theatres were not in substantial competition. Since such basic issues are raised in the counterclaim, which is triable by a jury, that right to trial by jury should be sustained whether or not, prior to the Federal Rules, the claim by Fox West Coast would have been heard by a Chancellor. To make the test of jury trial turn on questions of substance and not of form would, in this case, strengthen the policy in favor of jury trials represented by the Seventh Amendment.

Wherefore, Petitioner prays that the Order of the Court of Appeals Denying the Petition for Writ of Mandamus be reversed and the case remanded to the Court of Appeals with directions (a) to issue the Writ of Mandamus as prayed for in the Petition to the Court of Appeals, or in the alternative (b) for further proceedings upon the Petition for Writ of Mandamus in accordance with this Court's order and opinion.

Respectfully submitted,

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## APPENDIX A.

### Statutes.

28 U. S. C. 1254(1).

Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon Petition of any party to any civil or criminal case before or after rendition of judgment or decree.

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### CONSTITUTION OF THE UNITED STATES — SEVENTH AMENDMENT.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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ACT OF JUNE 19, 1934, 48 STAT. 1064, 28 U. S. C.  
SECTIONS 723, 723c.

"Be it enacted that the Supreme Court of the United States shall have the power to prescribe, by general rules for the District Courts of the United States, and for the Courts for the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedures in civil actions at law. Said rule shall neither abridge, enlarge nor modify the substantive rights of a litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2. The Court may at any time unite the general rules prescribed for it for cases in equity with those in



actions at law so as to secure one form of civil action and procedure for both: provided, however, that in such union of rules the right of trial by jury as at common law and declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

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FEDERAL RULES OF CIVIL PROCEDURE—U. S. C. A. 28,  
SECS. 2201 and 2202.

SECTION 2201.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

SECTION 2202.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

FEDERAL RULES OF CIVIL PROCEDURE 8a—U. S. C. 28.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends,

unless this court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

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FEDERAL RULES OF CIVIL PROCEDURE 12b—U. S. C. 28.

Every defense, in law or fact, to a claim for relief in an pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for

summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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FEDERAL RULES OF CIVIL PROCEDURE 13a—U. S. C. 28.

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

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FEDERAL RULES OF CIVIL PROCEDURE 13b—U. S. C. 28.

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

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FEDERAL RULES OF CIVIL PROCEDURE 13g—U. S. C. 28.

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

FEDERAL RULES OF CIVIL PROCEDURE 13h—U. S. C. 28.

When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

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28 U. S. C. FEDERAL RULES OF CIVIL PROCEDURE—Rule 38(a).

The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

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FEDERAL RULES OF CIVIL PROCEDURE—U. S. C. A. 28, RULE 42a and 42b.

42(a) When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

42(b) The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

28 U. S. C. FEDERAL RULES OF CIVIL PROCEDURE—  
RULE 57.

The procedure for obtaining a declaratory judgment pursuant to Title 28, U. S. C. Par. 2201, shall be in accordance with these rules, and the right of trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.



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**OCT 30 1958**

**JAMES R. BROWNING, Clerk**

**OCTOBER TERM, 1958**

**No. 45**

**BEACON THEATRES, INC., a corporation,**

*Petitioner,*

*vs.*

**THE HONORABLE HARRY C. WESTOVER, Judge of the  
United States District Court of the Southern District  
of California, Central Division,**

*Respondent.*

**BRIEF FOR THE RESPONDENT.**

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1958

No. 45

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BEACON THEATRES, INC., a corporation,

*Petitioner,*

*vs.*

THE HONORABLE HARRY C. WESTOVER, Judge of the  
United States District Court of the Southern District  
of California; Central Division,

*Respondent.*

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**BRIEF FOR THE RESPONDENT.**

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**Introduction.**

In our brief in opposition to Petition for Writ of Certiorari we strongly urged that the posture of the present proceeding—still in its pleading stages only—made it inappropriate for this Court at this time to pass upon the issues presented. Having read the Brief for Petitioner we are doubly confirmed in that view and are convinced that the issue sought to be presented—whether the Petitioner has been improperly deprived of a right to have a jury as opposed to the Court decide an issue of fact—cannot be adequately reviewed on the pleadings alone without the benefit of a trial record.

### Statement of Facts.

This is a motion picture case having the seed of its origin in *United States v. Paramount Pictures, Inc., et al.*, 334 U. S. 131, 92 L. Ed. 1260, 68 S. Ct. 915. That decision and the decrees of the District Court which flowed from it held it to be improper for a distributor of motion pictures to grant "clearance" (the practice of licensing a picture to one theatre on condition that it would not be licensed to another theatre until after the lapse of a designated period of time) unless the two theatres were substantially competitive to each other [R. 13-15].

The Petitioner constructed a drive-in theatre eleven miles and twenty minutes driving time from downtown San Bernardino [R. 16] and, contending that it was not substantially competitive to theatres in downtown San Bernardino and other theatres in the "San Bernardino competitive area" [R. 17], demanded from the distributors the right to exhibit their pictures simultaneously with their showing in these other theatres [R. 18] or, as it is expressed in the industry, on a "day and date" exhibition. Petitioner denied that any distributor had the right to license its pictures to these other theatres with clearance over its drive-in [R. 18]. It coupled these contentions with threats that unless it got what it wanted, i.e., the right to simultaneous exhibition, it would sue for treble damages under the antitrust laws [R. 18].

Fox West Coast Theatres Corporation owned and operated the California Theatre in the City of San Bernardino and, as the complaint alleges, had theretofore enjoyed the right of negotiating with the distributors, along with other first run theatres in the competitive area, for a first run exhibition right with clearance over a theatre licensing the same picture for exhibition in the area sub-

sequently [R. 15-16]. This right, the complaint alleges, was a valuable property right and its deprivation would result in substantial damage to Fox West Coast [R. 16].

The complaint proceeds to allege that the threats of treble damage litigation being made by the Petitioner unless it got simultaneous exhibition rights threatened to and had in fact deprived Fox West Coast of its previously enjoyed right to negotiate competitively with other theatres in the area for first run privileges with clearance over the subsequent exhibition of the picture and that it would be irreparably harmed unless the threats of litigation<sup>1</sup> were enjoined pending a determination by the Court whether there in fact existed that competition between the respective theatres for much of the same potential theatre patronage as would justify either theatre in negotiating for a prior run with clearance over the other.<sup>2</sup> [R. 18].

We pause here to make two pertinent observations: The first is that Fox West Coast by its action was seeking to have the Court declare its right to compete with the Petitioner, Beacon Theatres, for the licensing of pictures and that it was Beacon Theatres that was seeking to avoid competition by demanding simultaneous exhibition rights. Second, in its persistent effort to cast this litigation in the role of the "juxtaposition of the parties" cases (a point

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<sup>1</sup>As the opinion of the Circuit Court observes, the complaint sought to enjoin the institution of any action under the antitrust laws as opposed to enjoining the threats of litigation. Clearly, however, if the institution of litigation were enjoined the threats of such suits would be dissipated.

<sup>2</sup>See by way of analogy the language of the court in *Theatre Enterprises v. Paramount Distrib. Corp.* 346 U. S. 537, 74 S. Ct. 257, 98 L. Ed. 273, at page 540, "Since the Crest is in substantial competition with the downtown theatres a day and date arrangement would be economically unfeasible."



to be developed later), the Petitioner repeatedly infers that the complaint alleges an *anticipation* of Petitioner's ultimate suit, by way of counterclaim, for treble damages (see Pet. Br. pp. 2, 16 and 22). The complaint alleges the exact antithesis (and again we advert to the undesirability of having to decide important questions of procedural law solely on the basis of an interpretation of pleadings); it alleges that because of its threats of antitrust litigation Petitioner had got what it demanded—but was not entitled to—from the distributors, namely licenses for simultaneous exhibition, and that the Plaintiff Fox West Coast was being irreparably harmed thereby. *It would seem a fair hypothesis from the allegations of the complaint that as long as its threats of litigation were succeeding the Petitioner never would in fact make good on those threats and bring its treble damage action under the antitrust laws.*

The complaint alleges a wrongful interference with a preexisting business relationship—the right to negotiate for the license of motion pictures on their first run in the San Bernardino area with a period of clearance over their subsequent exhibition in a competitive theatre.<sup>3</sup> It does

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<sup>3</sup>That this is a valuable and protectible right is made clear from the opinion of the court below [R. 112-116]. See also *International News Service v. Associated Press*, 248 U. S. 215, 236, 39 S. Ct. 68, 63 L. Ed. 211, 219; *Truax v. Raich*, 239 U. S. 33, 37, 35 S. Ct. 7, 60 L. Ed. 131, 133; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 254, 38 S. Ct. 65, 62 L. Ed. 240, 277; *California Grape Control Board v. Calif. Produce Corp.*, 4 Cal. App. 2d 242, 244, 40 P. 2d 846; *Buxbom v. Smith*, 23 Cal. 2d 535, 140 P. 2d 1; *Remillard-Dandini Co. v. Dandini*, 46 Cal. App. 2d 678, 116 P. 2d 641; Annot. 9 A. L. R. 2d 228. Restatement "Torts" Sec. 766. The right to first run exhibition is a valuable property right. *Dade Enterprises v. Wometko Theatre* (Fla.), 160 So. 209; *Montgomery Enterprises v. Empire Theatre*, 204 Ala. 566, 86 So. 880, 887; *Alcazar Amusement Co. v. Mudd & Colley Amusement Co.*, 204 Ala. 509, 86 So. 209.

not deny to Petitioner an equal and correlative right to compete for the license of first run films; what it does assert is that Petitioner is not entitled to take the cream from the top of the pitcher by its insistence upon the right to exhibit the same picture at the same time thereby diluting the potential patronage at both theatres. Accordingly, complainant sought the aid of the court to enjoin, *pendente lite*, the continued threats of suit unless Petitioner got what it wanted and to determine as between the parties whether they were to be free to compete for first run pictures or whether the drive-in was entitled to exhibit the same pictures simultaneously without competition.

The sequel can be told soon enough. Beacon Theatres with its strategy of threats and coercion in imminence of being forestalled, counterclaimed for \$300,000 treble damages under the antitrust laws (notwithstanding its drive-in theatre had been open only a few weeks), alleging not an unreasonable grant of clearance between theatres not in substantial competition with each other (which might have been the reverse of the coin to the action for Declaratory Judgment—see Point III below), but alleging in the broadest and most castigating terms a general, comprehensive and continuing conspiracy in restraint of trade between the major exhibitors in the San Bernardino area and the distributors of motion pictures (i) to monopolize first run exhibition, (ii) to refrain from competing between themselves, (iii) to grant preferences to these favored theatres and to protect them from competition, and (iv) to discriminate against Beacon Theatres in the grant of run, clearance and rental terms [R. 39-41].

Adopting the approach used by its counsel in *Institutional Drug Distributors v. Yankwich* (C. A. 9), 249 F. 2d 566, Petitioner demanded a jury trial on all issues.

The Respondent judge, on motion of Fox West Coast, refused to permit this strategy to prejudice its rights to an early declaration as prayed in the complaint<sup>4</sup> and ordered the equitable and declaratory relief issues posed by the complaint and answer thereto separated from the antitrust issues and to be set for trial before the Court at an early date (as contemplated by Rule 57, F. R. C. P.—“The court may order a speedy hearing on an action for declaratory judgment and may advance it on the calendar”). The Court's Order is set forth at R. 52.

In his Response to the Order to Show Cause the Respondent set forth the reasons for his ruling:

“(3) In separating the issues in said action and in ordering an early trial of the issues raised by the complaint of plaintiff therein, respondent was performing a judicial act within his jurisdiction and discretionary power and was thereby exercising his said judicial discretion and fully performing his judicial functions and duties in accordance with Rules 57 and 42b of the Federal Rules of Civil Procedure. That it was and is the position of respondent that plaintiff may not be deprived of its prerogative of securing an early judicial declaration of its rights by the Court as presented by its complaint for declaratory judgment by the expedient of a Cross-Claim under the anti-trust laws raising wholly different and divergent issues from those raised by the complaint and answer

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<sup>4</sup>The prejudice arising out of a single jury trial on the issues of the complaint and the antitrust counterclaim are set forth on page 77 of the Record. The prejudice incident to Fox West Coast having to introduce the *Paramount* decrees in evidence in its case in chief is recognized in *Barron & Holtzoff* as constituting good Practice, Sec. 943, p. 666. “Another ground for separate trials is ground for separation; 2 *Barron & Holtzoff*, Federal Rules and the avoidance of prejudice, as where evidence admissible only on a certain issue may prejudice the jury as to other issues.”

thereto and upon which Cross-Claim a jury trial is demanded" [R. 68].

The trial judge was further meticulously careful to preserve to the Petitioner intact its right to a jury trial upon the issues raised by its cross-claim for antitrust violation, striking for that purpose the affirmative defense and allegations of the same antitrust violations from Petitioner's answer to the complaint, to the end that none of the material issues similarly raised by the cross-claim might be prejudged by the Court in the action for injunctive and declaratory relief<sup>5</sup> [R. 52]. The trial judge stated in his Response to the Order to Show Cause:

"(2) Respondent has not and does not propose to deny to defendant a jury trial upon the legal issues presented by its Cross-Claim.

\* \* \* \* \*

"(4) Contrary to the averment contained in Paragraph XI of petitioner's Petition for Writ of Mandamus, a determination of the issues raised by the complaint in said action will not serve as an adjudication of the basic issue raised by defendant's Cross-Claim, to wit, that of conspiracy to restrain trade which will remain undecided until the trial of the issues raised by said Cross-Claim" [R. 68].

Raising the cry of deprivation of jury trial, the Petitioner petitioned the Court of Appeals for the Ninth Circuit for a Writ of Mandamus, the denial of which by that court is now under review here.

<sup>5</sup>In this respect, the Order of Separation was more meticulous in preserving the petitioner's full right to a jury trial on all issues of its legal counterclaim than was the order in *Institutional Drug Distributors v. Yankwich* (C. A. 9), 249 F. 2d 566, where the affirmative defense of unclean hands was left for determination by the court without a jury. See dissent of Judge Barnes at p. 571.

It would be an act of supererogation for us here to comment upon what we consider to be the well-reasoned opinion of Judge Pope [R. 102-125]; suffice it to say that the Court left undetermined the principal reason for denying the writ, namely that this is not a proper case in which to permit the extraordinary interlocutory remedy of the All Writs Act (28 U. S. C. Sec. 1651) to be invoked.

### **Respondent's Contention.**

It is the contention of the Respondent before this Court

1. That the question whether the Petitioner was or was not limited in its rights to a trial by jury upon all issues of fact in the pending litigation is inappropriate for consideration by the Court at this time upon a Petition for Writ of Mandamus and before trial on any of the issues of the complaint or counterclaim.

2. That should the Court entertain the merits of the appeal, there is in fact no substantial issue common to both the equitable action and the antitrust counterclaim on which Petitioner will be deprived of a jury trial.

3. That even if there is a common substantial issue between the two phases of this litigation, namely, whether Petitioner's drive-in theatre is or is not in substantial competition with other first run theatres in the San Bernardino area, that is not an issue as to which Petitioner is entitled to a jury determination as a matter of right under the Constitution or laws of the United States.

### **Inaccuracies of Petitioner's Statement of Questions Presented.**

Before expanding upon these three contentions, however, and because it will serve to point up the basic weaknesses of the Petitioner's argument we shall first take issue



with its statement of "The Questions Presented" (Pet. Br. pp. 2-4).

*Petitioner says:*

"1. May a Court of Appeals hold \* \* \* that substantial issues of fact raised in a complaint which prays for a declaratory judgment of nonliability (a) \* \* \* which complaint is filed in anticipation (b) of a suit for damages, triable as of right to a jury, shall be tried to the court without a jury \* \* \* because the complaint also alleges threats of that damage suit (c) and irreparable injury resulting therefrom." (Pet. Br. p. 3.)

*Respondent observes:*

(a) The complaint does not pray for a declaratory judgment of nonliability to the charges of antitrust violations contained in the counterclaim subsequently filed. It prays for a determination by the court that the California Theatre of Fox West Coast and the Petitioner's drive-in are each sufficiently competitive for the same potential pool of theatre patronage as would justify either theatre in seeking to license a picture ahead of and with clearance over the other theatre within the clearance circumscriptions of the *Paramount* decrees. It seeks a determination of Fox West Coast's right to compete for first run pictures against Petitioner's claim to be freed from having to compete.

(b) The complaint was not filed in anticipation of a suit for damages.<sup>6</sup> The complaint alleges threats of litigation and that because of those threats Peti-

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<sup>6</sup>To the extent this may present a question of fact, review by this Court on a prerogative writ before trial is clearly premature.

tioner was getting the simultaneous exhibition rights it demanded but was not properly entitled to. This is clearly tantamount to an allegation that so long as Fox West Coast was having inflicted on it the harm from which it sought equitable relief, the Petitioner never would institute its threatened antitrust suit. In the words of the Opinion of the Circuit Court:

"Consistently with the allegations of the complaint defendant, unless enjoined, could go on indefinitely threatening the distributors and the plaintiff with future suits; as long as the threats worked, defendant would have its way and the business of the plaintiff would be seriously limited" [R. 116].

(c) It was not because the complaint alleged threats of a damage suit that the Court of Appeals upheld the separation of the issues; it was because the complaint invoked equity jurisdiction and set forth good grounds for equitable relief that justified the trial judge in exercising his discretion under Rule 42(b) to try the issues raised by the complaint and answer thereto before trying the antitrust counterclaim before a jury. To quote but one sentence of the Circuit Court's Opinion:

"We think these later decisions correctly point out that the Rules of Civil Procedure referred to in the Hollzer case were not designed to make any substantial change in the right to jury trial or to alter any pre-existing right of the trial judge to determine in his discretion whether trial of the suit in equity shall be prior to the submission of the issues in the legal action in any case where, as here, both types of action are presented by the pleadings" [R. 120].

*Petitioner says:*

"2. Where the basic issues in a complaint seeking an injunction against a threatened jury trial for damages (a) are in essence a defense to or denial of issues (b) in that impending action may a litigant be deprived of a jury trial as to those issues by their prior trial by the court \* \* \*" (Pet. Br. p. 3).

*Respondent observes:*

(a) There is a purposeful maladroitness in counsel's choice of words: "a complaint seeking an injunction against a threatened jury trial for damages." The complaint, of course, seeks equitable relief against continuing irreparable injury to the plaintiff's business by the Petitioner's wrongful threats of litigation if the distributors should fail to accord it a right to exhibit pictures simultaneously with their first run exhibition in the San Bernardino area.

(b) As is developed at greater length below, the basic issue in the complaint is neither a defense to nor a denial of the charges of malefaction made in the antitrust counterclaim. The issue which the Court is called upon to decide in the complaint is whether the California Theatre and the drive-in are sufficiently competitive each with the other as would justify either theatre in negotiating with the distributors for a prior run of a picture with clearance over the other theatre. It seems obvious from the face of it that if the Respondent Judge on the evidence finds that the theatres are substantially competitive, as Fox West Coast contends, such a finding would aggravate rather than mitigate the charges made in the counterclaim that Fox West Coast and others had conspired to monopolize first run in the San Bernardino area,

had conspired to fix a system of runs and clearances in their favor, and had conspired to discriminate against Petitioner's drive-in. Similarly, if the Respondent Judge should find the theatres not to be substantially competitive, if Fox West Coast has in fact engaged in the wrongful conduct charged in the counterclaim, we fail to see where a finding of non-competitiveness would constitute a defense to such a violation of the penal laws of the United States.

*Petitioner says:*

"(3) May a Federal Court \* \* \* in a civil action involving joined or consolidated so-called 'equitable' and so-called 'legal' claims, which claims include common substantial questions of fact, deprive either party of a properly demanded jury trial upon those substantial questions of fact by proceeding to a previous disposition of the claim denominated 'equitable' \* \* \*" (Pet. Br. p. 4).

*Respondent observes:*

That the plaintiff, Fox West Coast, alleging a bona fide grievance, with irreparable injury ensuing therefrom and no adequate remedy at law, may not be deprived of its right to an expeditious trial upon its complaint for declaratory and equitable relief through the defendant's strategy in countering with broad charges of violations of the antitrust laws. The doors of the Federal Courts are not closed to one charged with violating the Sherman Act. (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545, 22 S. Ct. 431, 46 L. Ed. 679, 685; *D. R. Wilder Mfg. Co. v. Corn Products Ref. Co.*, 236 U. S. 165, 174, 35 S. Ct. 398, 59 L. Ed. 520, 525; *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248, 253, 45 S. Ct. 300,

69 L. Ed. 597'), and we shudder to think what would happen to the calendar of the federal courts if the trial court had no discretion to defer and separately try the all-too-frequently asserted countercharge of antitrust violation. As observed by Judge Byers in *Smith, Kline & French Labs. v. International Pharmaceutical Labs.* (D. C. N. Y.), 98 Fed. Supp. 899, 901:

"However, it is possible to gather that the defendants, by way of avoidance, wish to establish the unworthy nature of the plaintiff's conduct and activities according to the defendants' notions, and the courts are open to them for that purpose. It seems to be recognized that such issues are for a jury, as lately declared in *Ring v. Spina*, 2 Cir., 166 F. 2d 546, but it does not follow that the defendants can thus compel the plaintiff to forego having a court decide the cause which it has proffered. Since the demand for a jury trial seems not to be in terms restricted to specific issues, the court may direct the procedural traffic so as to accomplish the orderly and reasonably prompt progress of the cause.

"The disposition of the motion is as follows:

"Pursuant to Rule 42(b) a separate trial of the counterclaim is deemed to be in furtherance of convenience, and is therefore ordered. The demand for jury trial will be restricted to the issues so presented.

"The cause is to be listed also on the non-jury calendar, to be tried by the court as provided in Rule 38(b) prior to the trial of the issues presented in the counterclaim."

See also the similar decision of Judge Bard in *Society of European Stage Authors and Composers v. WCAU Broadcasting Co.* (D. C. Pa.), 35 Fed. Supp. 460, 461.



I.

**Appeal, Not Mandamus, Is the Proper Means to Review Any Alleged Error.**

The burden of the Petitioner's appeal to this Court is that it has been deprived of the right to a jury determination upon an issue of fact common to both the equity action and the legal counterclaim for damages for antitrust violation. The Court of Appeals entertained the Petition for Writ of Mandamus on the merits and concluded that the Respondent Judge acted properly within the bounds of his discretion in separating the issues for trial. Accordingly, it denied the Petition for Writ of Mandamus without passing upon the propriety of utilizing an extraordinary writ as a means of interlocutory review.

Regardless of the merits of the Petitioner's grievance we do not conceive an extraordinary writ before judgment and before trial on either proceeding to be an appropriate means of reviewing an interlocutory order of the trial court.

The All Writs Act, 28 U. S. C. Sec. 1651, provides:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

It is difficult to comprehend in what manner the issuance of a Writ of Mandamus would aid the jurisdiction of the Court of Appeals where, if the Respondent Judge was in error in denying a jury trial upon any substantial common issue of fact, that error may be reviewed on appeal from final judgment, as was in fact done in each of the thirteen Appeals Court cases cited in footnote 12, page 22 of Petitioner's Brief.

While strong argument could be made that the Court is actually without power to issue a Writ of Mandamus where the error, if any there be, is reviewable on appeal from final judgment,<sup>7</sup> we prefer to address ourselves to the inappropriateness of this extraordinary remedy in the case at bar.

The Petitioner represents to the Court that there is a substantial issue of fact, to-wit the degree of competition

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<sup>7</sup>Judge Magruder of the First Circuit in *In re Chappell & Co.*, 201 F. 2d 343, 346; and in *In re Previn*, 204 F. 2d 417, 418, concludes that the issuance of mandamus to reverse a denial of a jury trial in no wise "aids" the jurisdiction of the court of appeal and is an improper use of the All-Writs section of the Judicial Code. *Black v. Boyd*, decided by the Sixth Circuit, and in which Mr. Justice Stewart participated, 248 F. 2d 156, presents an interesting discussion of the power of the Court of Appeals to issue a writ of mandamus where a jury trial has been denied upon a legal counterclaim to an action in equity and questions whether the 1948 recodification into Section 1651(a) of the Judicial Code of the former Section 342 may not have rendered *Ex parte Simons*, 247 U. S. 231, 38 S. Ct. 497, 62 L. Ed. 1094, of historical interest only. Of double interest in the case is the fact that while the court concluded that it had power to mandamus the trial court to restore the legal counterclaim to the jury calendar, it had no power to direct the trial court against separating the issues and trying the equity suit first to the court without a jury. In a subsequent *per curiam* proceeding reported in 251 F. 2d 843, the court said in denying a subsequent application for leave to file petition for writ of mandamus, p. 844:

"The Court is of the opinion that the order of December 27, 1957, was one within the discretion of the District Judge. Rule 42(b), Rules of Civil Procedure, 28 U. S. C. A.; *Big Cola Corporation v. World Bottling Co.* (6th Cir.), 134 F. 2d 718, 723. Although the writ of mandamus is available to require a court to make a ruling, it will not issue for the purpose of directing the Court to rule in a specific way. *Jewell v. Davies*, 6 Cir., 192 F. 2d 670, 673. If the District Court has misconstrued our prior directive in *Black v. Boyd*, supra, 248 F. 2d 156, any error can be corrected by an appeal from the final judgment, if and when one should be entered adverse to the petitioner. *Walker v. Brooks*, 6 Cir., 251 F. 2d 555. The circumstances are not such as to justify the use of the writ of mandamus as a substitute for an appeal. *Massey-Harris-Ferguson, Limited, v. Boyd*, 6 Cir., 242 F. 2d 800, 803, certiorari denied, 355 U. S. 806, 78 S. Ct. 48, 2 L. Ed. 50."

between the theatres involved, common to both the action for equitable and declaratory relief and the antitrust counterclaim. Only a trial on the facts can determine whether that fact issue is in truth common to both causes and is material to both. The complaint alleges that succumbing to the threats of antitrust litigation, the distributors have deprived Fox West Coast and its California Theatre "of the right to negotiate for first run in the San Bernardino area and to negotiate for clearance over theatres in competition with plaintiff's said theatre upon first run, including defendant's Bel-Air Drive-In Theatre" [R. 18]. If that allegation is proven and no clearance was in fact granted the California Theatre over the drive-in, the issue of competition between the theatres would be immaterial in the antitrust action. Moreover, as we have shown above, if in fact Fox West Coast and the distributors have conspired together to monopolize first run, to discriminate against the drive-in and to refuse it an opportunity to compete for the prior run, then whether the theatres are competitive or not is of no consequence; certainly, it is no defense to the wrongs charged in the counterclaim.

Hence we say that until there is a trial record to review, it is wholly premature on the pleadings alone to attempt to determine whether Petitioner has actually been or will be deprived of a jury trial upon any significant issue in its counterclaim.

Again it should be noted that Petitioner's contention that it is being deprived a jury trial upon a substantial common issue of fact is directly controverted by the trial judge who, in his response to the Order to Show Cause, stated:

"(4) Contrary to the averment contained in Paragraph XI of petitioner's Petition for Writ of Man-

damus, a determination of the issues raised by the complaint in said action will not serve as an adjudication of the basic issue raised by defendant's Cross-Claim, to wit, that of conspiracy to restrain trade which will remain undecided until the trial of the issues raised by said Cross-Claim" [R. 68].

Additionally, Petitioner represents to the Court that Fox West Coast brought its action for equitable and declaratory relief in anticipation of and as an anticipatory defense to the antitrust counterclaim. We say the complaint alleges the exact contrary [R. 18]—that as long as Petitioner's coercive threats of litigation were working it had no intention of instituting an action under the antitrust laws.<sup>8</sup> At best, whether the remedy at law was adequate when the complaint was filed, because the institution of the antitrust suit may have been imminent and its imminence known to the plaintiff, can only be determined when the evidence is in.<sup>9</sup>

We urge, therefore, that whether or not power lay in the Court of Appeals to grant the writ, this is not such a case as would justify the granting of a prerogative writ when appeal from the final judgment can present the question in more definitive and intelligent form.

The very restricted limitations which the court has thrown about the extraordinary remedy of mandamus needs no great elaboration. See Rule 30 of the Supreme Court Revised Rules. The Writ has generally been confined to cases of an abnegation of jurisdiction by a lower

<sup>8</sup>The Court of Appeals agrees with us. [R. 116.]

<sup>9</sup>The importance of the pendency or imminence of the action at law upon the adequacy or inadequacy of the remedy at law is illustrated in *Atlas Life Insurance Co. v. Southern*, 306 U. S. 563, 572, 2 S. Ct. 657, 83 L. Ed. 987, 993.

court (*La Buy v. Howes Leather Co.*, 352 U. S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290) or inappropriate exercise of jurisdiction (*U. S. Alkali Export Ass'n v. United States*, 325 U. S. 196, 65 S. Ct. 1120, 89 L. Ed. 1554) and never was a vehicle for controlling and directing the discretionary power of the court acting within its jurisdiction.

In *Parr v. United States*, 351 U. S. 513, 76 S. Ct. 912, 100 L. Ed. 1377, this court stated the bounds for the issuance of extraordinary writs to review interlocutory orders, page 520 of 351 U. S.

"Such writs may go only in aid of appellate jurisdiction, 28 U. S. C. §1651. The power to issue them is discretionary and it is sparingly exercised. Rule 30 of the Revised Rules of this Court and the cases cited therein. This is not a case where a court has exceeded or refused to exercise its jurisdiction, see *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 26, 89 L. ed. 1185, 1190, 63 S. Ct. 938, nor one where appellate review will be defeated if a writ does not issue, cf. *Maryland v. Soper*, 270 U. S. 9, 29, 30, 70 L. ed. 449, 456, 457, 46 S. Ct. 185. Here the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction. The extraordinary writs do not reach to such cases; they may not be used to thwart the congressional policy against piecemeal appeals. *Roche v. Evaporated Milk Assn.*, supra (319 U. S. at p. 30)."

*Bankers Life and Casualty Co. v. Holland*, 346 U. S. 379, 74 S. Ct. 145, 98 L. Ed. 106, clearly demonstrates the impropriety of reviewing on petition for a writ discretionary action taken by a trial judge. That was an action for treble damages under the antitrust laws brought in the Southern District of Florida naming as defendants, in ad-



dition to residents of that district, the insurance commissioner of Georgia, who was personally served in Florida. The trial court after holding that it had jurisdiction of the action and of the commissioner held that venue was not properly laid as to the commissioner and ordered the action as to him severed and transferred to the Northern District of Georgia. Petitioner then sought a Writ of Mandamus from the Court of Appeals to compel the vacation of the order of severance and transfer. The Supreme Court affirmed the denial of the writ, saying, page 382 of 346 U. S.:

"The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 USC §1651-(a). As was pointed out in *Roche v. Evaporated Milk Asso.*, 319 U. S. 21, 26, 87 L. ed. 1185, 1190, 63 S. Ct. 938 (1943), the 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. \* \* \* Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, *Roche v. Evaporated Milk Asso. (US)* supra, and is review-

able upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in *De Beers Consol. Mines v. United States*, 325 U. S. 212, 217, 89 L. ed. 1566, 1572, 65 S. Ct. 1130 (1945). This is not such a case.

"It is urged, however, that the use of the writ of mandamus is appropriate here to prevent 'judicial inconvenience and hardship' occasioned by appeal being delayed until after final judgment. But it is established that the extraordinary writs cannot be used as substitutes for appeals, *Ex parte Fahey*, 332 U.S. 258, 260, 91 L. ed. 2041-2043, 67 S. Ct. 1558 (1940), even though hardship may result from delay and perhaps unnecessary trial, *United States Alkali Export Assn. v. United States*, 325 U.S. 196, 202, 203, 89 L. ed. 1554, 1560, 1561, 65 S. Ct. 1120 (1945); *Roche v. Evaporated Milk Assn.*, *supra* (319 U.S. at 31); and whatever may be done without the writ may not be done with it. *Ex parte Rowland*, 104 U.S. 604, 617, 26 L. ed. 861, 866 (1882). *We may assume that, as petitioner contends, the order of transfer defeats the objective of trying related issues in a single action and will give rise to a myriad of*

legal and practical problems as well as inconvenience to both courts; but Congress must have contemplated those conditions in providing that only final judgments are reviewable. Petitioner has alleged no special circumstances such as were present in the cases which it cites.

\* \* \* \* \*

"We adhere to the language of this Court in *Ex parte Fahey*, supra (332 U.S. at 259, 260):

"Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. . . . As extraordinary remedies, they are reserved for really extraordinary causes." (Italics ours.)

It is not without interest to note that in both *Ex parte Simons*, 247 U. S. 231, 38 S. Ct. 497, 62 L. Ed. 1094, and *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 44 S. Ct. 446, 68 L. Ed. 912, the petitioner's entire case and not an isolated issue of fact was being taken from the jury to which the court held they were respectively entitled; in *Ex parte Peterson*, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919, while the court entertained the petition for the writ it denied it when the trial court took not the entire case from the jury but rather referred a complicated accounting to an auditor to report on it to the court and jury.

Other decisions of this court cited in footnote 1 on page 3 of Petitioner's Brief involved not a deprivation of jury

trial but either a wrongful assumption of jurisdiction by the trial court—*U. S. Alkali Export Assn. v. United States*, 325 U. S. 196, 65 S. Ct. 1120, 89 L. Ed. 1554; *Ex parte Williams*, 277 U. S. 267, 48 S. Ct. 523, 72 L. Ed. 877—or a refusal to assume jurisdiction—*Los Angeles Brush Mfg. Co. v. James*, 272 U. S. 701, 47 S. Ct. 286, 71 L. Ed. 481; *McCullough v. Cosgrave*, 309 U. S. 634, 60 S. Ct. 703, 84 L. Ed. 992; *La Buy v. Howes Leather Co.*, 352 U. S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290.

As was said in *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 63 S. Ct. 938, 87 L. Ed. 1185, where the granting of a Writ of Mandamus was reversed, page 26 of 319 U. S.:

“The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Ex parte Peru*, supra (318 U.S. 578, 581, ante, 1914, 1016, 63 S. Ct. 793), and cases cited; *Ex parte Newman*, 14 Wall. (U.S.) 152, 165, 166, 169, 20 L. ed. 877, 879, 880; *Ex parte Sawyer*, 21 Wall. (U.S.) 235, 238, 22 L. ed. 617, 618; *Interstate Commerce Commission v. United States*, 289 U.S. 385, 394, 77 L. ed. 1273, 1278, 53 S. Ct. 607. Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal. *Ex parte Harding*, 219 U.S. 363, 369, 55 L. ed. 252, 254, 31 S. Ct. 324, 37 LRA (N.S.) 392; cf. *Stoll v. Gottlieb*, 305 U.S. 165, 83 L. ed. 104, 59 S. Ct. 134, 38 Am. Banker Rep. (N.S.) 76; *Treinies v. Sunshine Min. Co.*, 308 U.S. 66, 84 L. ed. 85, 60 S. Ct. 44.”

It was on this ground the court distinguished the *Simons*, *Peterson* and *Skinner & Eddy Corporation* cases, saying page 32 of 319 U. S.:

"The decisions of this Court on which respondents especially rely are not applicable here. In *Ex parte Simons*, 247 U.S. 231, 62 L. ed. 1094, 38 S. Ct. 497, the writ directed the district court to set aside its order transferring to the equity docket a case plainly triable at law by jury. The district court's order was regarded by this Court 'as having repudiated jurisdiction' of the suit. In *Ex parte Peterson*, 253 U.S. 300, 64 L. ed. 919, 40 S. Ct. 543, in which the writ was sought similarly to compel the district court to set aside its order referring the cause to an auditor, the application was denied because the order was held not to preclude a jury trial. And in *Re Skinner & E. Corp.*, 265 U.S. 86, 68 L. ed. 912, 44 S. Ct. 446, the writ prohibited the Court of Claims from exercising jurisdiction, contrary to statute, over a suit which it had previously dismissed. There its assumption of jurisdiction would have deprived the litigants of trial by jury in a state court where an action against an agency of the United States involving the same issue was pending. Thus in the two cases in which the writ was granted, it was issued in aid of the appellate jurisdiction of this court to compel an inferior court to relinquish a jurisdiction which it could not lawfully exercise or to exercise a jurisdiction which it had unlawfully repudiated. Cf. *Ex parte Peru*, 318 U.S. 578, ante, 1914, 63 S. Ct. 793, supra. In the present case the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power. In issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress,



which has restricted that court's appellate review to final judgments of the district court."

From the foregoing decisions of this Court the conclusion seems compelled that mandamus is not the appropriate or proper means of determining what may be the limits imposed by Rule 38(a) upon the trial court's discretion under Rules 39(a)(2) and 42.

Whatever occasion may have existed in the past to tempt the Court to broaden the narrow limitations it has placed around the issuance of prerogative writs to review interlocutory orders of a trial court is now set at rest by the enactment on September 2, 1958, of the Interlocutory Appeals Act (Public Law 85—919 quoted in the Appendix). This places the review of important interlocutory orders before final judgment not in the hands of the advocate where it can be used for delay or to impede the orderly conduct of the court's business but where it belongs, in the discretion of the trial court and of the Court of Appeals.

The present case presents a vivid illustration of the vice of permitting the use of extraordinary writs. The complaint praying for a declaratory judgment and equitable relief and alleging irreparable injury was filed on October 31, 1956 [R. 103]. A motion to dismiss the complaint was denied January 14, 1957 [R. 21]. Thereafter the counterclaim under the antitrust laws and demand for a jury trial on all issues of the complaint and counterclaim was filed and in March 1957 the demand for a jury trial on the complaint was stricken, the issues ordered separated and the complaint and answer put on the calendar of April 1, 1957, for setting for trial [R. 52]. Thence ensued the present delay of more than a year and a half wherein Petitioner has sought to invoke the extraordinary

remedy of Writ of Mandamus. We do not believe that dilatory tactics of this character should be encouraged by the court countenancing the present petition.

## II.

### **There Is No Common Substantial and Material Issue Between the Antitrust Counterclaim on Which Jury Trial Has Been Preserved and the Complaint for Declaratory and Equitable Relief.**

There is a thoroughly well established line of decisions, mostly insurance and patent cases, which Professor Moore has facilely termed "juxtaposition of the parties" cases, wherein what would constitute a defense to an action at law is sought to be determined in advance and in anticipation thereof in a proceeding for declaratory judgment or equitable relief. With virtually complete unanimity the courts have held that one may not by reversing the normal procedure deprive his adversary of his right to a jury trial.<sup>10</sup> With these cases we have absolutely no quarrel; we wholeheartedly concede their soundness. We do not, however, concede that this case falls within their ambit for two separate and distinct reasons: (i) the juxtaposition of the parties cases are those wherein the issue presented in the equity or declaratory relief action would be determinative of the defendant's potential action at law;<sup>11</sup> the issue of competition between the theatres

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<sup>10</sup>Judge Healy in *Dickinson v. Gen. Acc. Fire & Life Assur. Co.* (C. A. 9), 147 F. 2d 396, 397.

<sup>11</sup>Thus see: *(American) Lumbermens Mut. Cas. Co. v. Timms and Howard* (C. A. 2), 108 F. 2d 497 (non-coverage); *Pacific Indemnity v. McDonald* (C. A. 9), 107 F. 2d 446 (fraud and collusion between insured and injured party); *Hargrove v. American Cent. Ins. Co.* (C. A. 10), 125 F. 2d 225 (fraud); *Dickinson v. General Accident Fire and Life Assur. Corp.* (C. A. 9), 147 F. 2d 396 (failure of insured to give written notice).

here would be determinative of little or nothing in the counterclaim for antitrust violation. (ii) There is an exception to the "juxtaposition of the parties" principle as widely observed as the principle itself; that is where the issue presented in the initiating action is not and may not become available as a defense to a subsequent action at law, then, as was adjudged by the Court of Appeals in the case at bar, the plaintiff's remedy at law is inadequate and the proceeding being equitable the defendant is not entitled to jury trial.

We proceed to a discussion of the first point here and to the second in Point III *infra*.

The fact issue in the action for equitable and declaratory relief is whether the Fox West Coast California Theatre and the Petitioner's drive-in are substantially competitive with each other. The fact issue in the counterclaim is whether the cross-defendants and co-conspirators therein named conspired together in restraint of trade and to monopolize in the manner alleged in the counterclaim [R. 39-41]. Absent conspiracy, whether or not the distributors licensed a single first run picture to Petitioner's drive-in, be it in substantial competition or not in substantial competition with other first run theatres in the San Bernardino area, Petitioner will not have made out a case on its counterclaim. As this Court said in *Theatre Enterprises v. Paramount Distrib. Corp.*, *supra*,

"The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express" (p. 540 of 346 U. S.) and further on p. 541 "but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

If Petitioner on its counterclaim should fail to prove conspiracy the issue of competition between the theatres is meaningless.

If Petitioner on the other hand succeeds in proving the allegations of its counterclaim, the conspiracy to monopolize first run and to discriminate against the new drive-in, the existence or non-existence of competition between the theatres would exculpate none of the alleged wrongdoers, although if there was an absence of competition between the drive-in and the other first run theatres, as Petitioner contended in its answer to the complaint [R. 29], it might have some difficulty proving injury to its business.

We assert, therefore, that the question of competition between the theatres is not a common substantial issue of fact to the equity complaint and the legal counterclaim within the meaning of that term in *Leimer v. Woods* (C. A. 8), 196 F. 2d 828, 836.<sup>12</sup>

**No Prejudice Can Arise From the Respondent's Prior Determination of the Issue of Competition Between the Theatres.**

Not only is the issue of substantial competition not a common material issue to the two actions but analysis shows that Petitioner can suffer no harm by the pre-determination of that issue by the court rather than by the jury. Suppose, *arguendo*, that the Respondent Judge finds in the equity suit that there is substantial competition between Petitioner's drive-in and the Fox West Coast California Theatre and so instructs the jury in the subsequent antitrust trial. If Petitioner can prove the alle-

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<sup>12</sup>Note that in the *Leimer* case there was but a single fact issue, whether the landlord had violated the ceiling rent regulation.

gations of its counterclaim that Fox West Coast, the other theatre owners named therein and the distributors of motion pictures have in fact conspired to keep first run pictures away from the drive-in, to monopolize first run in the San Bernardino area and to discriminate against the drive-in, then surely Petitioner has been materially benefited from the Court's prior finding of the existence of substantial competition between the theatres and its burden of proving the injurious impact of the wrongful conduct upon its business is to that extent lessened.

If on the other hand the Respondent Judge finds that the theatres are not substantially competitive and so instructs the jury, the Petitioner will not be prejudiced in his antitrust trial to the jury because forsooth the alleged conspiracy to favor the Fox West Coast theatre, to give it a monopoly on first run and to deprive the non-competitive drive-in theatre of first run pictures would be but the more unreasonable and without any semblance of economic or business justification.

Whichever way the declaratory judgment goes the Petitioner will be aided before the jury *provided always, of course, that Petitioner can make good on its charges of an unlawful conspiracy in restraint of trade, a wrongful conspiracy to give Fox West Coast and the other accused theatre owners preferential treatment and a monopoly on first run at the expense of the Petitioner.*

There is still another analysis which lays bare the pedestal of sand on which Petitioner's case is constructed. After final judgment adverse to it on its antitrust counterclaim let us assume that the Petitioner seeks to claim error because of the separation of the issues and the trial court's prejudgment of the question of substantial competition



between the theatres. From the jury's verdict adverse to it there is only one conclusion to be drawn and that is that Petitioner has failed to prove any conspiracy in restraint of trade. Where would lie the reversible error in the court's prejudgment respecting competition? Which ever way the declaratory judgment went the Petitioner has still failed to sustain its burden of proving the alleged unlawful conspiracy in restraint of trade, i.e., the conspiracy to favor Fox West Coast and the other theatres at the expense of the drive-in. If the jury could have found the theatres were competitive when the trial judge found they were not, would its verdict have been any different if by necessary hypothesis the jury found against the alleged conspiracy? Or contrariwise, if the jury could have found the theatres were non-competitive when the trial judge decided they were competitive, would its verdict have been altered? To answer yes to that question would be to say that all a motion picture exhibitor has to prove to recover treble damages under the antitrust laws is that he was not granted the right to exhibit a picture simultaneously with a non-competitive theatre. Such is not the law.<sup>13</sup> Concert of action or unlawful conspiracy must

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<sup>13</sup>*Fox West Coast Th. Corp. v. Paradise Th. Building Corp.* (C. A. 9)—not yet reported:

"If one thing is more certain than any other in this field, it is that Paradise had no right as such to demand licensing on a seven-day basis."

*Franchon & Marco, Inc. v. Paramount Pictures, Inc.* (C. A. 9), 215 F. 2d 167, 169:

"No rule of law required appellees to give Baldwin a preferred position irrespective of conditions at the time of filing of this case."

*Loew's, Inc. v. Cinema Amusements* (C. A. 10), 210 F. 2d 86, 92:

"One of such rules is that the producers and distributors of motion picture films are not required to license their products

still be proved (*Theatre Enterprises v. Paramount Distrib. Corp.*, *supra*).

Deprivation of a jury trial upon the issue of competition between the theatres involved is a hollow cry, without substance or real meaning when analyzed against the allegations of the antitrust counterclaim.

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to every exhibitor who desires or requests them. Neither are they under duty to accord to an exhibitor any particular run—first or otherwise—of films which are furnished him. An exhibitor does not have the absolute right to compel producers and distributors to furnish him films or to give him the privilege of exhibiting them on the basis of any specified run. *William Goldman Theatres, Inc., v. Loew's, Inc.*, 3 Cir., 150 F. 2d 738, reaffirmed on a subsequent appeal, 3 Cir., 164 F. 2d 1021, certiorari denied, 334 U. S. 811, 68 S. Ct. 1016, 92 L. Ed. 1742; *Chorak v. RKO Radio Pictures*, 9 Cir., 196 F. 2d 225, certiorari denied, 344 U. S. 887, 73 S. Ct. 186."

*Paramount Film Distributing Corp. v. Applebaum* (C. A. 5), 217 F. 2d 101, 124:

"Despite the multitude of decisions against film distributors, it is still the law that ordinarily a distributor has the right to license or refuse to license his film to any exhibitor, pursuant to his own reasoning, so long as he acts independently. \* \* \* The three instructions complained of in effect told the jury that every distributor of films *must as a matter of law* accept all equally suitable exhibitors as customers and *must* treat them all equally. Such a statement not only overlooks the peculiarities of the motion picture exhibiting business, but it also obviously conflicts with the settled law to the contrary."

*Chorak v. RKO Radio Pictures* (C. A. 9), 196 F. 2d 225, 228:

"As pointed out in *Fanchon & Marco v. Paramount Pictures, Inc.*, *supra*, 100 F. Supp. at page 90 an exhibitor does not have the right to *compel* a motion picture producer to give him a preferred run—this because as a very practical matter the motion picture industry could not operate under a system of simultaneous releases. This obvious fact underlies the doctrine that clearances and runs are not illegal *per se*."

*United States v. Colgate & Co.*, 250 U. S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 997.

*Times-Picayune Pub. Co. v. United States*, 345 U. S. 594, 625, 73 S. Ct. 872, 97 L. Ed. 1277, 1299.

III.

**Even Though Competition Between the Theatres Be a Substantial Common Issue Petitioner Is Not Entitled to a Jury Trial on That Issue.**

In upholding the exercise of its discretion by the trial court to try the equitable and declaratory judgment issues ahead of the antitrust counterclaim, the Court of Appeals did so upon the ground that the complaint demonstrated the inadequacy of any legal remedy and plaintiff having pleaded a claim for equitable relief, the Petitioner-defendant was not entitled to a jury trial thereon and did not become so entitled by subsequently filing its legal counterclaim for treble damages.

At this point it may be well to restate a few basic precepts:

(i) The Federal Rules of Civil Procedure were designed to preserve intact but not otherwise to enlarge upon a party's right to jury trial. 5 Moore Fed. Practice (2nd Ed), Sec. 38.07, p. 39-42.

(ii) There is no right to jury trial in a suit in equity. *United States v. Louisiana*, 339 U. S. 699, 706, 70 S. Ct. 914, 94 L. Ed. 1216, 1220; 5 Moore Fed. Practice (2nd Ed.), Sec. 38.11(6), p. 115 *et seq.*

(iii) Where certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. F. R. C. P. Rule 39(a)(2); *Liberty Oil Co. v. Condon Nat. Bank*, 260 U. S. 235, 43 S. Ct. 118, 67 L. Ed. 232 (cited in support of the Rule in the Advisory Committee notes).

We think it clear that prior to the adoption of the Federal Rules Petitioner would not have been entitled to a jury trial upon the issues posed by the complaint for equitable and declaratory relief. The basic nature of the issue posed (*cf.* 5 Moore Fed. Practice (2nd Ed.), Sec. 38.16, p. 148 *et seq.*) was whether Fox West Coast had the right to continue to negotiate with distributors for first run with clearance over the new drive-in theatre free from the coercion and threats of antitrust litigation if it did so. No money damages were claimed and irreparable injury and inadequacy of remedy at law were alleged. Moreover, as above demonstrated, the existence or non-existence of substantial competition between the California Theatre and the drive-in would have been no defense to the antitrust counterclaim subsequently filed.<sup>14</sup>

Most closely comparable to the present are those cases in which an insurer's remedy at law is inadequate either because loss has not yet occurred or the incontestible period may run before suit is instituted on the policy.

5 Moore Fed. Practice (2nd Ed.), Sec. 38.16, p. 158:

"Where, however, liability under the policy has not matured, as where the insured is still living, and the insurer brings an action for rescission and cancellation within the time permitted by the incontestable clause, the issue is equitable. It will be noted that the insurer had no remedy at law."

<sup>14</sup>*Cf. City of Morgantown v. Royal Ins. Co.* (C. A. 4), 169 F. 2d 713, affirmed on other grounds 337 U. S. 254, 69 S. Ct. 1067, 93 L. Ed. 1347, where reformation of the insurance policy was sought after loss. Judge Parker pointed out that unlike fraud in the procurement which could be pleaded as a defense to an action on the policy, reformation could be had only in equity, there was no adequate remedy at law, and hence the insured was not entitled to jury trial.

The distinction made between the adequacy or inadequacy of the remedy at law as a criterion for determining whether the cause is in equity or at law is best illustrated by comparing two decisions of this court: *Enelow v. New York Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440, and *American Life Insurance Co. v. Stewart*, 300 U. S. 203, 57 S. Ct. 377, 81 L. Ed. 605.<sup>15</sup> In the former case where the insured had died and action had been commenced on the policy, the court<sup>o</sup> held that fraud in the procurement was available as a defense and hence the remedy at law was adequate. The opinion of Mr. Chief Justice Hughes states, page 384:

"The instant case is not one in which there is resort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable. Here, on the death of the insured, an action at law was brought on the policy, and the defendant had opportunity in that action at law, and before the policy by its terms became incontestable, to contest its liability and accordingly filed its affidavit of defense. \* \* \* In such a case, the defense of fraud is completely available in the action at law and a bill in equity would not lie to stay proceedings in that action in order to have the defense heard and determined in equity. *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 623, 20 L. ed. 501, 503; New

<sup>15</sup>See also annotations on the subject in 73 A. L. R. 1529 and 114 A. L. R. 1275.



York L. Ins. Co. v. Bangs, 103 U.S. 780, 782, 26 L. ed. 608, 609; Cable v. United States L. Ins. Co., 191 U.S. 288, 305, 48 L. ed. 188, 193, 24 S. Ct. 74; American Mills Co. v. American Surety Co., 260 U.S. 360, 363, 67 L. ed. 306, 308, 43 S. Ct. 149; New York L. Ins. Co. v. Marshall (C.C.A. 5th) 23 F. (2d) 225; New York L. Ins. Co. v. Miller (C.C.A. 8th) 73 F. (2d) 350, *supra*."

In *American Life Ins. Co. v. Stewart*, *supra*, the insured died three months after obtaining the insurance in question and the company brought suit in equity within the incontestable period to cancel the policies for fraud in the procurement. Thereafter the beneficiaries brought action at law to recover on the policies. Mr. Justice Cardozo and a unanimous court held that the action properly proceeded in equity and that the subsequent suit at law did not oust the equity jurisdiction once attached. The court said, page 212:

"If the policy is to become incontestable soon after the death of the insured, the insurer becomes helpless if he must wait for a move by some one else, who may prefer to remain motionless till the time for contest has gone by. A 'contest' within the purview of such a contract has generally been held to mean a present contest in a court, not a notice of repudiation or of a contest to be waged thereafter. See, e.g., *Killian v. Metropolitan L. Ins. Co.*, 251 N.Y. 44, 48, 166 N.E. 798, 64 A.L.R. 956; *New York L. Ins. Co. v. Hurt* (C.C.A. 8th) 35 F. (2d) 92, 95; *Harnischfeger Sales Corp. v. National L. Ins. Co.* (C.C.A. 7th) 72 F. (2d) 921, 922. Accordingly an insurer, who might otherwise be condemned to loss through the mere inaction of an adversary, may assume the offensive by going into equity and there

praying cancellation. This exception to the general rule has been allowed by the lower Federal courts with impressive uniformity.

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"Here the insurer had no remedy at law at all except at the pleasure of an adversary. There was neither equality in efficiency nor equality in certainty nor equality in promptness. 'The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.' *Bank of Kentucky v. Stone* (C.C.) 88 F. 383, 391; cf. *Lincoln Nat. L. Ins. Co. v. Hammer* (C.C.A. 8th) 41 F. (2d) 12, 16."

Petitioner's attempt to bring the present litigation within the principle of the *Enelow* case (Pet. Br. p. 31) must necessarily fail for the dual reasons that (i) a determination that each of two theatres are sufficiently competitive as would justify either in negotiating for a run ahead of and with clearance over the other would not constitute a defense to the broad charges of antitrust violation nor even necessarily be determined in the antitrust counterclaim—hence the filing of the counterclaim did not supply the adequate remedy at law required by the *Enelow* decision; and (ii) the adequacy of the remedy at law is to be determined when the suit in equity is commenced. As the Court of Appeals cogently observed [R. 116] there was no assurance that an antitrust action would ever be brought [in fact, the allegations of the complaint make it clear that as Petitioner's threats were successful suit by the Petitioner was most unlikely—R. 18], hence distinguishing the case from *Phoenix Mut. Life Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501, where death had occurred and the obligation under the policy became fixed when the bill in equity for cancella-

tion was filed<sup>16</sup> and from *Di Giovanni v. Camden Fire Ins. Co.*, 296 U. S. 64, 56 S. Ct. 1, 80 L. Ed. 47, where the fire had happened and proof of loss been filed before the insurance company commenced its action.

Although from what has been said it is apparent that the filing of the antitrust counterclaim never did furnish an adequate remedy at law, it is equally well settled that the adequacy of the remedy at law is to be determined when the suit in equity is commenced and is not affected by subsequent events. *American Life Ins. Co. v. Stewart*, *supra*, where the court said, at page 215:

"The argument is made that the suits in equity should have been dismissed when it appeared upon the trial that after the filing of the bills, and in October, 1932, the beneficiaries of the policies had sued on them at law. But the settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter. *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U.S. 288, 296, 65 L. ed. 638, 646, 41 S.Ct. 272; *Lincoln Nat. L. Ins. Co. v. Hammer*, *supra*; *New York L. Ins. Co. v. Seymour* (C.C.A. 6th) 45 F. (2d) 47, 73 A.L.R. 1523, *supra*."

To the same effect are *Spector Motor Service v. O'Connor*, 340 U. S. 602, 605, 71 S. Ct. 508, 95 L. Ed. 573, 577; *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, 296, 41 S. Ct. 272, 65 L. Ed. 638, 647; *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 590, 593, 41 S. Ct. 209, 65 L. Ed. 425, 430; 19 Am. Jur. "Equity", Sec. 105, p. 112.

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<sup>16</sup>In the *Phoenix* case it does not appear that an incontestable clause was involved, thus differentiating it from *American Life v. Stewart*.

As the Petitioner would have had no right to a jury trial on the issues raised by the complaint under the separation of law and equity prior to the adoption of the Federal Rules he has not been deprived of the right to a jury trial by the exercise of his discretion by the Respondent Judge to separate the issues under Rule 42(b).

**Even Without the Equitable Issues in Paragraph XII of the Complaint the Right to a Jury Trial Thereon Is at Least Dubious.**

The opinion of the Court of Appeals places much emphasis upon the equitable issues and indicates that without them the decision might have been governed by the *McDonald* and *Dickinson* cases [R. 110]. We think this is an oversimplification and that it presupposes that the declaratory judgment allegations posed legal issues triable to a jury. Actually an action to declare whether there exists substantial competition between two theatres within the circumscriptions of prior equity decrees (*United States v. Paramount Pictures, Inc., et al.*) is certainly not a "suit at common law" nor in the nature of one. No damages were asked and the fact question sought to be determined was for the purpose of interpreting prior injunctive decrees entered against the principal distributors of motion pictures by another court in the light of the situation which presented itself in the San Bernardino area where the Petitioner built its drive-in theatre and made its demands for simultaneous exhibition rights. We sincerely question whether on the declaratory judgment allegations alone a jury trial could properly have been demanded.

Comparable is the statement of Mr. Chief Justice Hughes in *National Labor Relations Board v. Jones &*

*Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, to a contention that the finding of unfair labor practices by the National Labor Relations Board and order of reinstatement with back wages violated the defendant's right to jury trial (p. 48 of 301 U. S.):

"The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

Nor would a jury trial of those declaratory judgment issues have become necessary when the antitrust counterclaim was filed on any "juxtaposition of the parties" theory. Had the counterclaim alleged simply an unreasonable restraint in that the distributors were granting the Fox theatre clearance over the drive-in when the theatres were not in competition with each other, a "*Dickinson*" or "*McDonald*" situation might well have been presented. But on its face the counterclaim under the antitrust laws does not allege an improper grant of clearance between non-competitive theatres. It alleges a conspiracy: (1) "To fix a system of runs and clearances" in the San Bernardino area; (2) To allocate pictures; (3) To refrain from competition; (4) To impose clearance against independent outsiders for the purpose of protecting a first run monopoly; and (5) To discriminate against independent theatres, including Petitioner's drive-in [R. 39-41]. There is not a word in the broad charges of the counterclaim to indicate that the source of Petitioner's grievance is the



grant of unreasonable clearance over non-competitive theatres or that this occasioned any part of its \$100,000 injury.

We have, therefore, on the pleadings, excluding all allegations sounding strictly in equity, not a "juxtaposition of the parties" case or a request for an adjudication of non-liability by a prospective defendant but what from the pleadings themselves appear to be largely, if not totally, unrelated issues.

We say, therefore, that ignoring the strictly equity aspects of the complaint, Petitioner has still failed to demonstrate its right to a jury trial upon the fact question of substantial competition. ♦

#### **The Proper Criteria for Determining the Limitations Upon the Trial Court's Discretion as to the Order of Trial.**

If any one thing is to be made abundantly clear on this appeal it is that the Respondent does not advocate or seek any ruling from this Court which would limit the traditional and precious right of jury trial. It is the Respondent's position that that right has been carefully, even jealously preserved to Beacon Theatres in the present case.

Respondent further recognizes that notwithstanding the discretion conferred upon the trial courts by the Federal Rules to separate issues (see *United States v. Yellow Cab Co.*, 340 U. S. 543, 555, 71 S. Ct. 399, 95 L. Ed. 523, 533) and to direct the order of trial that discretion cannot be completely untrammelled in the face of the Seventh Amendment and the mandate of Rule 38(a).

The proper bounds of that discretion can best be illustrated by considering two district court decisions. In *Blechman, Inc. v. Kleinert Rubber Co.* (D. C. N. Y.), 98 Fed. Supp. 1005, an antitrust complaint was filed seeking

both money damages and an injunction against continuing violation (similar to *Ring v. Spina* (C. A. 2), 166 F. 2d 546). Judge Kaufman held that plaintiff could not be deprived of a jury trial on the legal issues but held, page 1006:

“However, neither the Federal Rules nor the Seventh Amendment to the Constitution requires that the issue as to plaintiffs’ right to injunctive relief because of defendants’ alleged violation of the anti-trust laws be tried by a jury. Whether or not this question should be separately tried by the court, and, if so, whether or not it should be tried before the legal issues, are questions not presented by the instant motion, and are matters within the discretion of the trial judge. 2 Barron and Holtzoff, Federal Practice and Procedure §894 (1950).”

It may well be that the case goes too far in intimating that the trial judge has complete discretion to separate the issues and to try the equity phase first without a jury where from all that appears that judgment would be determinative of the entire case. The right to jury trial on the legal issue of violation of the antitrust laws and damages sustained therefrom could thus be completely nullified. We are more disposed to agree with *Sablosky v. Paramount Film Distributing Corp.* (D. C. Pa.), 13 F. R. D. 138, with the observation, however, that in each case, as in *Ring v. Spina, supra*, the joinder of legal and equitable issues was in the same pleading (complaint for damages and injunction) and in each the determination of the one issue would be completely determinative of the other.

In the case at bar we have a plaintiff pleading and becoming entitled to equitable relief at the hand of the Chancellor and a defendant filing a legal counterclaim upon a

wholly diverse and infinitely broader claim wherein the determination of the equitable issue is in no sense determinative of or a defense to the legal counterclaim. In such a case the trial court should not be without discretion to permit plaintiff to proceed with its claim for equitable relief unhampered by the delay and prejudice which would flow from a compulsory submission to all issues to a jury. We think the distinction between the two lines of cases, which is implicit in *American Life Ins. Co. v. Stewart*, *supra*, is real and should be recognized.

In short, the only situations in which there is real justification for holding the trial court's discretion limited by the Seventh Amendment and by Rule 38(a) are those wherein legal and equitable issues are joined in the same pleading and the determination of one would be determinative of the other and in the true "juxtaposition of the parties" cases where the complaint in equity is no more than an anticipatory defense to the counterclaim at law.

A third district court decision points up the true line of demarcation: In *Martin v. Wyeth, Inc.* (D. C. Md.), 96 Fed. Supp. 689, suit was brought for patent infringement, breach of confidential relations and wrongful appropriation of invention. The defendant filed a counterclaim for damages for the dissemination by plaintiff to the trade of a circular which was defamatory and damaging to it with respect to its business practices and products. Judge Chesnut in separating the issues of the counterclaim observed, page 697:

"The subject matter presents questions of law which are so different from and unrelated to those involved in the patent case that it seemed to me inadvisable to possibly tend to blunt the sharp focus of attention on the dominant question by contemporaneous consideration of such a different subject matter.

Therefore a further hearing on the issue raised by the counterclaim will be postponed to a later time when counsel desire to bring it on for adjudication.

This was the procedure adopted by Judge Byers in the *Smith, Kline & French Laboratory* case, *supra*, and by Judge Bard in *Society of European Stage Authors v. WCAU*, *supra*, where an action for copyright infringement met with a counterclaim of antitrust violation. The court said (35 Fed. Supp. 461):

"As to whether there shall be separate trials and separate judgments rests in the sound discretion of the trial judge, and the determining factors are the doing of justice, the avoidance of prejudice, and the furtherance of convenience. *Seagram-Distillers Corporation v. Manos*, D.C., 25 F. Supp. 233. There being nothing to compel a joint trial of the separate issues I am constrained, by reason, to agree with the plaintiff that the convenience and fairness of separate trials warrant separation.

\* \* \* \* \*

"By granting separate trials delay will be avoided and the claim set forth in this complaint can be tried on November 13th as listed. To prevent further delay will be doing justice in accord with the spirit of the Rules of Civil Procedure."

#### Petitioner's Decisions Are Inapt Here.

If we understand Point B of Petitioner's Brief<sup>17</sup> it is that the complaint at bar fails to state a claim for equity.

<sup>17</sup>Without wishing to be critical, we encounter some difficulty because the statement attributed to the court in *Eastern Petroleum Co. v. Asiatic Petroleum Co.* (C. A. 2), 103 F. 2d 315 (Br. p. 26) cannot be found in the decision and the statement of Judge Learned Hand in *Leach v. Ross Heater & Mfg. Co.* (C. A. 2), 104 F. 2d 88 (Br. p. 29) turns out to be in a dissent in a case furnishing clear support for the maintenance of the present action.

able relief because it fails to allege that Beacon Theatres' threats of suit were only spurious. What the complaint alleges, of course, is threats by Petitioner that if Fox California Theatre were granted a prior run or clearance over the drive-in Petitioner would sue for treble damages under Section 4 of the Clayton Act (15 U. S. C., Sec. 15) and that these threats of litigation "threaten to and have in fact deprived plaintiff and its said California Theatre of the right to negotiate for motion pictures of their first run in the San Bernardino area" [R. 18]. The complaint may not be a model of pleading, as observed by the Court of Appeal, but we suggest that it adequately alleges a wrongful interference with plaintiff's business relations by threats of litigation addressed to plaintiff and its customers.

*Kidd v. Horry*, 28 Fed. 773, stands for no more than the proposition that equity will not enjoin the publication of a business libel and it is distinguished upon this very ground in *Emack v. Kane*, 34 Fed. 46, 50, also cited in Petitioner's Brief (p. 29). The distinction is made the subject of an annotation in 148 A. L. R. 853 which points out that while a trade libel *per se* may not be enjoined, if it is coupled with other grounds for equitable relief, such as coercion upon plaintiff's customers not to deal, an injunction will lie. See cases commencing page 861.

The statement in footnote 13 on page 30 of Petitioner's Brief to the effect that Fox West Coast could not have suffered any injury when it filed its complaint because Petitioner's drive-in had not yet opened overlooks the fact that licenses for the exhibition of motion pictures are negotiated weeks before the picture is exhibited (thus note advance advertising done by a theatre of "coming attractions"). Moreover, the plaintiff alleged that Petitioner's threats of litigation *threatened* to deprive it and had de-



prived it of the right to negotiate for first run pictures with clearance over the drive-in [R. 18]. It is hornbook that:

"Threatened irreparable injury is one of the grounds for issuance of the writ of injunction. Where a continued use or threatened danger is such as to cause reasonable fear of irreparable injury, it is not essential that there be actual damage; or even a completed violation of the plaintiff's rights, in order to entitle him to the protection of equity." (19 Am. Jur. "Equity" 529, p. 56.)

*Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 38 S. Ct. 65, 62 L. Ed. 260.

### Conclusion.

The basic fault with Petitioner's position before this court can best be demonstrated by taking a sentence out of its Brief. On page 35 it is said:

"The decision in the Beacon case now holds that this right to jury trial is lost; that *if the court determines to try the antitrust issues under the equitable claim for an injunction first*, that Rule 42b provides the source of such power even though the effect is to destroy the right to jury trial \* \* \*".

Certainly, if the Respondent Judge were to try the anti-trust issues under the complaint for equitable and declaratory relief the doctrine of *res judicata* would effectively deprive Petitioner of its right to a jury on its counterclaim. But there are no antitrust issues raised in the complaint and when Beacon Theatres sought to inject them in its answer [R. 30-33] the Respondent struck that portion of the pleading to abide the trial of the antitrust counterclaim before a jury [R. 52].

Respondent in his Response to the Order to Show Cause correctly analyzed the case when he stated:

“(1) Under the Seventh amendment to the Constitution the right to trial by jury does not exist with respect to the issues raised by plaintiff's complaint in said action for the reasons:

“(a) the allegations of said complaint present a case cognizable in equity in that plaintiff has alleged that defendant has interfered with plaintiff's right to negotiate for clearance in favor of its theatre over those competitive to it and that plaintiff is without any speedy or adequate remedy at law and that it will be irreparably harmed unless an injunction is issued. Respondent has not, as averred in Paragraphs IX and X of the Petition for Writ of Mandamus herein, denied a jury trial on the issues presented by said complaint for the reason that an action for declaratory relief is per se an action in equity, but for the reason that the complaint contains allegations sounding in equity and prays for equitable relief. Monetary damages are nowhere sought in said complaint;

“(b) an action to determine whether two theatres are in competition and whether clearance may be granted was unknown to the common law and has its genesis not in the common law but in part at least in the decree of the court of equity in *United States v. Paramount*, (66 Fed. Supp. 323, 342—‘The decision of such controversies as may arise over clearance should be left to local suits in the area concerned \* \* \*’).

(2) Respondent has not and does not propose to deny to defendant a jury trial upon the legal issues presented by its Cross-Claim” [R. 67-68].

Whatever might be the disposition of this court to limit the discretion given to the trial court by the Rules to separate issues and to determine the order of trial when the right to a jury trial is demanded, this case does not present the question for determination for the simple reason that deprivation of a jury trial on any of the substantive issues of the antitrust counterclaim just cannot be demonstrated except by the type of reckless statement quoted above.

We have shown, we hope beyond further question, that a judicial determination of whether two theatres are sufficiently competitive to justify either in seeking to negotiate for a prior run with clearance over the other, whichever way the question is determined, will be determinative of no material issue raised by the charges of antitrust violation.

For the reasons stated the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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## APPENDIX.

"Interlocutory Appeals Act" P. L. 85-919—to amend  
§1292 of 28 U.S.C.—Sept. 2, 1958

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days of the entry of such order. Provided, however, that an application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

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**IN THE**

**Supreme Court of the United States**

**October Term, 1958.**

**No. 45**

**BEACON THEATRES, Inc., a corporation,**

*Petitioner,*

**vs.**

**THE HON. HARRY C. WESTOVER, Judge of the United  
States District Court of the Southern District of Cali-  
fornia, Central Division, Fox West Coast Theatres  
Corporation, Pacific Drive-In Theatres, Inc.,**

*Respondent.*

**REPLY BRIEF OF PETITIONER.**

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*Respondent.*

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**REPLY BRIEF OF PETITIONER.**

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In assessing the issues as they are now framed, it is significant to note the contentions in the brief filed by respondent's attorneys in response to the main argument in petitioner's brief.

A.

Petitioner said: The right to jury trial with respect to a suit for declaratory relief is to be determined by a decision as to the character of the suit for which the declaratory action is a substitute. The instant suit seeking a declaration that clearance between the California and Bel-Air would not constitute a basis for a treble damage antitrust suit is a substitute for that treble damage

antitrust suit. Therefore, petitioner had a right of jury trial as to the issues of clearance and competition in the declaratory relief suit.

Respondent replies by arguing that "the complaint does not pray for a declaratory judgment of non-liability to the charges of antitrust violation contained in the counterclaim subsequently filed (Resp. Br. p. 9) and later says *"had the counterclaim alleged simply an unreasonable restraint in that the distributor was granting the Fox Theater clearance over the Drive-in when the theaters were not in competition with each other, a 'Dickinson' or 'McDonald' situation might well have been presented."* (Resp. Br. p. 38.) The "Dickinson" and "McDonald" situation referred to are the cases of *Dickinson v. General Accident Fire and Life Assurance Company*, 147 F. 2d 396, and *Pacific Indemnity v. McDonald*, 107 F. 2d 446, wherein, following the generally accepted rule, the Court of Appeals for the Ninth Circuit held that a suit for declaratory relief may not be substituted for a suit for coercive relief and by that substitution alone destroy the right of jury trial.

Petitioner replies that this concession, emphasized above, precisely covers this case. Looking at the complaint alone—and respondent now proposes to try the complaint alone—had petitioner filed only a general denial and demand for a jury trial, the demand must have been honored. The concession demonstrates that petitioner would have been entitled to that jury trial because the complaint was a substitute for an antitrust damage claim alleging that there was an unreasonable restraint of trade in that the distributors were granting the Fox Theater clearance over the Drive-in. Standing alone, therefore, the complaint

was triable to a jury and the order striking the demand was error.

A fortiori, when the counterclaim raised the *same* issue as one of the issues to be tried to a jury, this constitutional right is protected.

Of course, as a matter of theory, it is unimportant whether a jury trial as to the issue of unreasonable restraint is deemed to be the *sole* issue in the complaint or *one* issue in the counterclaim. Rule 42(b) provides ample authority for a trial court to direct the separate jury trial of one of a number of *jury* issues encompassed either by a complaint or by a counterclaim. The power to try this issue separately to a jury, which power Fox West Coast has never sought to invoke, defeats the weak contentions made in respondent's brief to the effect that the unreasonable restraint issues must necessarily confuse the jury as to other antitrust issues.

B.

Petitioner argued that the allegations in paragraph XII of the complaint could not convert the action for declaratory relief into an action to be pigeon-holed "in equity" because (a) those allegations were essential allegations to valid pleading of the declaratory relief claim and (b) no equitable claim was stated because the complaint on its face negated that petitioner was unwilling to test its claim of antitrust violation in court. Even if it were argued that there are *both* declaratory relief issues *and* equitable issues in the case, it is clear that the declaratory relief issue is that of unreasonable restraint while the so-called "equitable" issue, at best would be only whether there was a good-faith claim or a "threat" by petitioner that clearance over this theater would violate the antitrust

laws. It is now well established in the lower Federal courts that if a complaint alleges facts giving rise to a jury trial claim at law and equitable issues are also raised, the legal issues are for the jury and the equitable issues are for the court.

*Ring v. Spina* (C. C. A. 2d, 1948), 166 Fed. 546;  
5 Moore's *Federal Practice*, 2d, pp. 143 to 163.

Similarly, here the claim for declaratory relief which is a substitute for the antitrust jury suit is triable to a jury while, giving the contentions in respondent's brief the most favorable interpretation, only the "equitable issue" as to the good faith of petitioner's alleged threats of an antitrust suit would be triable to the court.

### C.

Petitioner argues that, assuming that Fox West Coast's remedy at law was inadequate at the time the complaint was filed because of the unalleged uncertainty as to whether petitioner would ever sue at law, that this uncertainty was promptly resolved by the filing, in due course, of the counterclaim. Respondent replies by urging a so-called maxim of the law of equity that although an inadequate remedy at law is made adequate by future events, the test must be applied mechanically at the time of suit even though the constitutional right of jury trial is the victim of the mechanical rule. The answer is found in the decision by Judge, later Mr. Justice, Rutledge in *Prudential Insurance Company v. Saxe*, 134 F. 2d 16, 32. The court held that under the Federal Rules of Civil Procedure, the inadequacy of a remedy at law which arises because the law action has not been filed is cured when, in fact, that action is filed by way of a counterclaim. As the court held, to rule otherwise would be in effect to deprive the



claimant of the right to jury trial, making the filing of the suits a race of diligence and do those things, when the fact which renders the remedy inadequate does not exist.

A different ruling would of course provide such a simple device for the destruction of the right of jury trial as to make possible the most serious evasion of the Seventh Amendment. A prospective defendant need only sue for declaratory relief and allege that the declaratory relief defendant has threatened a suit at law and irreparable injury is resulting and, automatically, the right to jury trial of substantive issues is lost. The result has been forbidden by this court beginning at least with *Russell v. Clarke Executors*, 7 Cranch 69, 3 L. Ed. 271. There the Court held that although bills of discovery were a basis for equitable jurisdiction, "this rule cannot be abused by being employed as a mere pretext for bring causes properly before a court of law into a court of equity." (7 Cranch 69, 89, 3 L. Ed. 271, 279.) See also:

*Hipp v. Babin*, 19 How. 271, 15 L. Ed. 663;

*Scott v. Nealy*, 140 U. S. 106, 11 S. Ct. 712, 35 L. Ed. 358;

*Clark v. Roller*, 199 U. S. 541, 26 S. Ct. 141, 50 L. Ed. 300;

*Buzard v. Houston*, 119 U. S. 847, 30 L. Ed. 541.

Thus if it be true that equitable relief against an action at law is sound, it is also true that where allegations of threats of an action at law would deprive a litigant of the right to jury trial as to substantive issues, when the action is in fact filed, the remedy at law is then adequate, and the mode of trial of those issues is by jury. If thereafter injunctive relief is called for, that remedy is still available.

D.

The brief on behalf of respondent urges this court to affirm the order below upon the grounds that relief by way of mandamus in the Court of Appeals is an inappropriate remedy in this case. The cases supporting mandamus as an appropriate remedy for petitioner here are cited at page 3 of petitioner's opening brief herein. However, it is respectfully submitted that no issue could be less appropriate for this court to determine now than the issue as to the availability of mandamus in the Court of Appeals. That court in this case specifically held that it did not reach that question [R. 125]. For this court to rule now would be anticipatory in the extreme.

Mandamus in the Court of Appeals, this court has held, is first to be decided by the exercise of that court's discretion. (*La Buy v. Howes Letter Co., Inc.*, 352 U. S. 249, 255.) Abuse of that discretion, if exercised, may or may not be ultimately reviewed here, but essential rules of practice of this court would be overturned if, before that discretion had been exercised, this court would rule as to the appropriateness thereof.

**Conclusion.**

This case presents the question as to whether a bona fide procedural device, i.e., declaratory relief, may be converted into a tactical weapon against the constitutional right of jury trial by judicial interpretation of rules of pleading and practice in a manner which would undermine the application of the Seventh Amendment to civil actions in the Federal courts. Petitioner submits that Rule 42(b) as an implement for the effective and efficient administration of the courts, need not be construed in such a manner as to diminish rights guaranteed by the Seventh Amend-

ment to the Constitution of the United States and that outmoded maxims of equitable jurisprudence of doubtful history need not be permitted to invade the right to jury trial.

Wherefore, petitioner prays that the Order of the Court of Appeals denying the Petition for Writ of Mandamus be reversed and the case remanded to the Court of Appeals with directions (a) to issue the Writ of Mandamus as prayed for in the petition to the Court of Appeals or in the alternative (b) for further proceedings upon the Petition for Writ of Mandamus in accordance with this court's order and opinion.

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